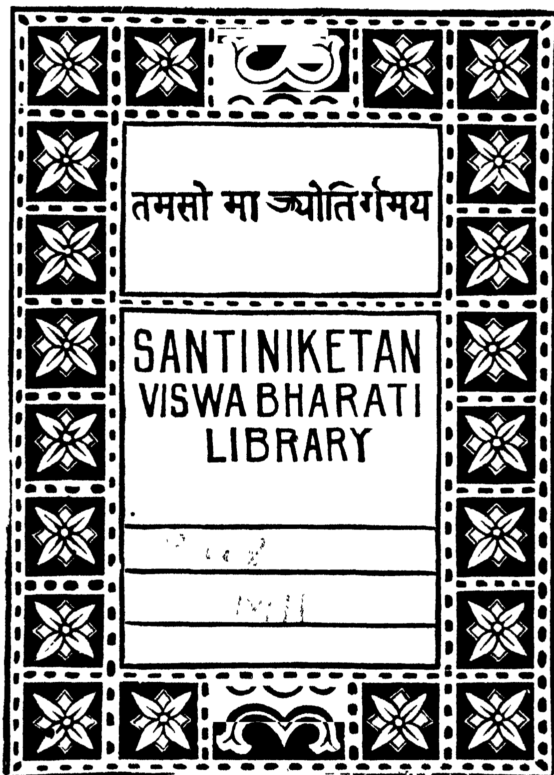

तमसो मा ज्योतिर्गमय
SANTINIKETAN
VISWA BHARATI
LIBRARY

THE MUSLIM LAW OF PRE-EMPTION

SHUF'A

Compiled from the Original Arabic Authorities and containing the Text and Translation of the Fatâwâ-i-'Alamgîrî and the Fatâwâ-i-Kâzî Khân

BY

AL-HAJ MAHOMED ULLAH *ibn* S. JUNG, M.A., LL.D.

Of Christ's College, Cambridge; Trinity College, Dublin; Barrister-at-Law, Lincoln's Inn, and Advocate, High Court, Allahabad; Reader in Law, University of Allahabad. Author of "The Muslim Law of Marriage," "The Administration of Justice of Muslim Law," "A Digest of Anglo-Muslim Law," etc.

ALLAHABAD:
THE INDIAN PRESS, LTD.
1931

Rs. 7-8

Printed by K. Mittra, at The Indian Press, Ltd., Allahabad.
and
Published by S. Sultan, 18 Edmonstone Road, Allahabad.

(Partly reprinted from the Allahabad University Studies, Vol. VII.)

Dedicated

To the Memory of

My Father

M. Hameed-Ullah Khan,

Al-Haj Afzal-ul-ulema .

Nawab Sarbuland Jung Bahadur.

CONTENTS

PREFACE

Shuf'a, the Muslim Law of Pre-emption, has been developed out of a few *hadises*, traditions, of the Great Prophet of Arabia. Its foundation seems to be based on the broad principle, that all members of the society should attempt to preserve the joint nature of their ancient ancestral property. Hence it is contrary to the modern idea of freedom of alienation of property, and is a restriction on the individual rights of ownership.[1] It is very difficult to trace the origin of the Law of Pre-emption, but some sort of pre-emptive law is found to be prevalent almost in every part of the world. It was in existence in Babylonia[2] and Egypt.[3] It was known to the Jews.[4] It was prevalent under the Roman Law.[5] It was within recent time in vogue in Germany,[6] it is now found in Norway,[7] in Sweden,[8]

---

[1] There are some careful and well analysed observations made on this subject by Mr. Justice Mahmood in Gobind Dayal *v.* Inayat Ullah (1885), 7 All., 775; and by Dr. M. L. Agarwala, and recently by Mr. D. W. Kathalay in their works on the Law of Pre-emption.

[2] Simcox, Primitive Civilisation, Vol. I, p. 322.

[3] Ibid., p. 186.

[4] Milman, History of the Jews, Vol. I, pp. 122, 195. Leviticus, Ch. 25, verses 10, 23—34.

[5] Code 4, 66, 3. It is sometimes called jus protimiseos *vide* Emphyteusis.

[6] The jus retractus of the German Law.

[7] The Cambridge Mediæval History, Vol. II, p. 634. "In Norway the ödal land ought to remain in the kindred."

[8] West and Buhler, Digest of Hindu Law, pp. 733, 734. Kathalay, The Law of Pre-emption, p. 24.

in Switzerland,[9] in Austria,[10] in France,[11] in Italy,[12] in Spain,[13] in Russia,[14] in the United States of America,[15] and also in England.[16] It is also found in China[17] and it was prevalent in Burma among the Buddhists,[18] though it appears that there was no pre-emption under the Hindu Law.[19] The Law of Pre-emption is even found in the modern International Law.[20] However in all these countries the Law of Pre-emption was not developed as a scientific exposition of substantive law, it is only traceable in a vague form, whereas the Muslim Law of Pre-emption stands on a different footing. It is a highly developed and a scientific exposition of a very difficult branch of law. In fact no other system known to the ancient or modern jurisprudence has so well defined principles restricting the individual rights of property and yet in complete harmony with

---

[9] Laveleye, Primitive Property, pp. 62, 152.

[10] Les Code Civilis E'tranger's **Introduction, LXXVIII,** Kathalay, The Law of Pre-emption, p. 25.

[11] Ibid., p. 238. The French Civil Code, Articles 1659—1661, 1673.

[12] Codice Civille Italian, Articles 1515—1528, diritto diriscatto.

[13] Civil Code of Spain, 1637, Porto Rico, 1540. C. P. Sherman, Roman Law in the Modern World, p. 177.

[14] Laveleye, Primitive Society, p. 152.

[15] The right given by the Federal Public Land Laws repealed March 3, 1891.

[16] Lands Clauses Consolidation Act, 1845, Sec. 128. Pre-emption as a Royal prerogative was surrendered by Charles II at his restoration, abolished by Statute 12, Car. 2, C. 24.

Vide The Small Holdings and Allotments Act, 1908, Sec. 12. Williams, Institutes of Justinian, p. 218.

[17] Simcox, Primitive Civilisation, Vol. II, p. 358.

[18] Manu Kyay, Book VII, Section 36. Chantoon, Principles of Buddhist Law, p. 131.

[19] Agarwala, M. L., The Law of Pre-emption, Chapter I. (Introductory.) D. W. Kathalay, The Law of Pre-emption, pp. 12—16.

[20] The Manual of Naval Prize Law (1888), Art. 84.

principles of equity, justice and good conscience. Indeed in this special branch of Muslim Law the Great Imam Abu Hanifa and his disciples have left a unique and distinct mark on the theory of jurisprudence.

In these few pages I have attempted to lay down in a codified form the principles of the Law of *Shuf'a.* I have based my conclusions on the recognised texts, and authorities like the *Fatawa-i-Alamgiri*, the ***Fatawa-i-Kazi Khan***, the *Hedaya*, the ***Durul-ul-Mukhtar*** and the ***Majma '-ul-Bahrain.*** This work will be found to contain some original matter in the sense not hitherto mentioned by the authors of Anglo-Muhammadan Law, and in support of my view the translation and passages of the *Fatawa-i-Alamgiri* may be consulted and incorporated for ready reference. I hope the work will meet with the approval of those interested in the Muslim Law.

—*M. U.*

THE MUSLIM LAW OF PRE-EMPTION

1. The right of pre-emption, *Shuf'a*[21] means a right to be substituted in place of the transferee of some immoveable property by reason of such right.

Shuf'a means a right to acquire by compulsory purchase some immoveable property in preference to all other persons[22] by reason of such right.

---

21 "The original meaning of *Shuf'a* is conjunction."

The Muslim Law of Pre-emption is administered by the Courts of British India on the ground of "justice, equity and good conscience." Spankie, J. in Chundo *v.* Alimoodeen, 6 N. W., 28 (1873) and Mahmood, J. in Gobind Dayal, 7 All., 775, (1884), insisted that the Muslim law of pre-emption should be treated under the Bengal, N.-W.P. and Assam Civil Courts Act as a "religious usage or institution," but the majority of the judges were not prepared to accept this view. The Muslim law of pre-emption is recognised to a limited extent in the Bombay Presidency and it is not recognised in the Madras Presidency even on the ground of equity and good conscience except in Malabar. In the Punjab, the law of pre-emption is regulated by the Punjab Pre-emption Act I of 1913. And in the North-West Frontier Province pre-emption is regulated by the Regulation II of 1906. In Oudh it is regulated by the Oudh Law Act XVIII of 1876. The recent Act regulating pre-emption is the Agra Pre-emption Act XI of 1922, as amended by Act VIII of 1923. All these enactments have almost abrogated the Muslim Law.

The Muslim Law of Pre-emption is frequently modified by local custom and is applicable among the Hindus by custom and under the *Wajib-ul-'arz*. In Bihar and Gujrat (Surat and Broach) a custom of pre-emption is recognised among the Hindus. Parasasth Nath *v.* Dhanai (1905), 32 Cal., 988; Fakir Rawat (1863), B. L. R., Sup. Vol. 35; Jadu *v.* Jani Koer (1908), 35 Cal., 575; Gordhandas *v.* Prankor (1869), 6 B. H. C. A. C., 263, but *vide* Dahya Bhai *v.* Chuni Lal (1913), 38 Bom., 183. A statement in the *Wajib-ul-'arz* is a good *prima facie* evidence of custom. A Muslim pre-emptor may lawfully base his claim in the alternative either on the Muslim Law or on the ground of custom. Abdul Hamid, 36 All., 573 (1914); 12 A. L. J. R., 966.

Wilson, pp. 373-374; Tyabji, pp. 651—669; Abbasi, pp. 3—16.

22 The right of pre-emption arises when there is a sale to a stranger, and the term stranger means in the pre-emption law a person who is neither a co-sharer nor a participator in the

The privilege of *Shuf'a* appertains to *'aqar*,[23] that is immoveable property.

2. The right of pre-emption appertains (i) to *Shafi'-i-Sharik*, a partner in the property, owner of an undivided share, a co-sharer; (ii) *Shafi'-i-Khalit* a participator in the immunities and appendages of the property[24];

---

appendages nor a neighbour to the subject-matter of pre-emption. A co-sharer who has concealed his interest (that is, there is a secret purchase, *bainami farzi*, in the name of another) cannot defeat the pre-emptive right of a *bona fide* co-sharer without any notice of the concealed purchase. Beni Shankar Shalhet *v.* Mahpal Bahadur Singh, 9 All., 481 (1887).

[23] Sircar, T. L. L. (1873), p. 509; T. L. L. (1874), p. 444; Baillie, Part I, p. 478; Agarwala, p. 31.

The subject of pre-emption must be *' Aqar* and that which comes within the meaning of the term *'Aqar*. *'Aqar* means immoveable property. *'Aqar* includes land whether arable or pasture, mansions, vineyards, gardens and enclosures, *e.g.*, a bath well. Under the *Shafi'* Law there is no pre-emption in indivisible things but under the *Hanafi* Law there is pre-emption in the case of a bath, a well and a mill. The *Maliki* jurists agree with the *Hanafi* view. It includes agricultural land. Shaeikh Jahangir *v.* Lala Bhekari Lal, 6 B.L.R., 42: 11 W.R., 71. It extends to a whole village. S.D.A., Cal., Vol. III, 85. Moveables if they are accessories are included in the term *'Aqar*. There is no pre-emption if trees or buildings are purchased with a view to removal, they are not included within the term *'Aqar*. It is otherwise if the trees are purchased with the ground on which they stand.

[24] Baillie, Part I, p. 481; Sircar, T.L.L. (1873), p. 514; Hamilton Hedaya (Grady), p. 548; Ameer Ali, Vol. I, p. 717; Dayal, p. 382; Abbasi, p. 78; Agarwala, p. 66; Wilson, p. 380; Tyabji, pp. 702—704.

In Chand Khan *v.* Nizamat Khan (1869), 3 B.L.R.A.C., 296, it was held that the owner of the land through which the land subject of pre-emption, receives irrigation has a preferential right to a mere neighbour. It is necessary that the road in common enjoyment must be a private road and not a thoroughfare. All *Khalits* have equal rights of pre-emption. It makes no difference if one of them happens to be a contiguous neighbour. Rahim Baksh *v.* Khuda Baksh, 16 All., 247.

The right of *Shuf'a* is recognised in the private right of water *sharb-khas* and in private right of way *tarik-khas*. As a rule a *khalit* in way, and a *khalit* in water have equal rights but a *khalit* in way is preferred to a *khalit* who has the right to the water conducted through another's field.

(iii) *Shafi'-i-jar* a neighbour, owner of contiguous immoveable property, a pre-emptor by right of vicinage.[25]

A mere tenant upon the land as such has no right of pre-emption, Gooman Singh *v.* Tripor Singh, 8 W.R., 437, nor can a mere possessor with no legal title, Beharee Ram *v.* Musammat Sheobhudra, 9 W.R., 455. The owner of a dominant tenement may lawfully pre-empt the servient tenement, his claim is preferred to that of a neighbour. And likewise the owner of the servient tenement in respect of the sale of the dominant tenement is preferred to a mere neighbour; Ranchoddas *v.* Jugal Das (1899), 24 Bom., 414; Karim *v.* Priyo Lal (1905), 28 All., 127; 2 A.L.J.R., 619. However a *khalit* is not necessarily an owner of dominant or servient tenement.

If a *Shafi'-i-khalit* happens to be a *Shafi'-i-jar* also but as such he has no preferential claim to pre-empt the whole property as against a vendee who is also a *khalit*. In such a case the property is equally divided. Muhammad Yakub *v.* Kanhai Lal, 19 A.L.J.R., 869 (1921); 44 All., 83.

It is maintained that among rival neighbours proximity to the property in question gives preference to one over the other but *vide* Syeeduddin *v.* Latifunnissa, 19 A.L.J.R., 909, where the Court held " that the Muhammadan Law of Pre-emption does not recognise degrees of nearness within the same class of pre-emptor." This view is correct as regards *sharik* and to some extent even in the case of *khalit* but it is not correct in the case of *Shafi'-i-jar.*

The expressions *Shafi'-i-sharik*, *Shafi'-i-khalit*, *Shafi'-i-jār* have been adopted by the commentators of Anglo-Muhammadan Law. The Arabic word *khalit* denotes both classes of pre-emptors, co-sharers and participators in easements.

[25] A neighbour in the land on which a common partition wall stands is preferred to all other neighbours, in fact under the *Hanafi* Law he is deemed to be a partner.

The right of pre-emption by vicinage applies to small plots of land and enclosures. It does not apply to large estates. Abdul Azim *v.* Khondkar Hamid Ali, 2 B.L.R.A.C., 63; 10 W.R., 356; Ejnas Kooer *v.* Shiekh Amjad Ally, 2 W.R., 261; Roshun Mahomed *v.* Mahomed Kalim, 7 W.R., 150, etc. In Mahomed Husain *v.* Mohsin Ali, 14 W.R.F.B., 1; all authorities were closely examined. Where a *mahal* is divided into two or more separate *mahals* no right of pre-emption exists merely on the ground of vicinage. Abdul Rahim Khan *v.* Kharag Singh, 15 All., 104, 12 A.W.N., 240. Suppose there were certain common appurtenances to the original *mahal* and were enjoyed in common by all on division of the *mahal* even then there is no right of pre-emption by reason of such common appurtenances. Nazir-uddin *v.* Kadir Baksh, 14 A.W.N., 193. However a partner in a big estate has a right to pre-empt when one of the co-sharers of

The *Jar-i-mulaziq*, contiguous neighbour, has preferable right of pre-emption among all *Shafi'-i-jar*, next the *Jar-i-mulasiq*, the neighbour behind, the mansion has the right of pre-emption.

In case of competition the first class excludes the second and second excludes the third.

According to the *Fatawa-i-'Alamgiri* the *Shafi'-i-jar* must demand pre-emption immediately on hearing of the sale and not wait till the *Shafi'-i-sharik* has surrendered his right, otherwise he will forfeit his right of pre-emption.

Under the *Shi'a* Law[26] there is no right of pre-emption if there are more than two co-sharers and there is no right of pre-emption on the ground of participation in the appendages nor on the ground of mere vicinage. Under the *Shafi'-i* Law pre-emption can only be claimed on the ground of partnership.

3. The rights of all pre-emptors of one and the same class are equal, and they are entitled to equal shares *per*

---

such estate sells his share. Sheikh Karim Baksh *v.* Kamurddin Ahmad, 6 N.-W.P. H.C.R., 377.

[26] Baillie, Part II, p. 175 (Sharaya-al-Islam); Ameer Ali, Vol. I, p. 737; Sircar, T.L.L. (1874), pp. 443—462; Abbasi, pp. 111—120. The *Shi'a* Law of Pre-emption is recognised by the Indian High Courts *vide* Abbas Ali, 12 All., 229 (1889); Rajah Deedar Hossein, 2 Moo. Ind. Ap., 441; Qurban Husain, 22 All., 102 (1899).

In Pir Khan, 36 All., 488 (1914). A *Shi'a* sold some property to the vendees who were Hindus. A *Sunni* pre-emptor claimed to pre-empt the property. The *Shi'a* vendor succeeded on the ground that there was no right of pre-emption for there were more than two co-sharers. It seems that according to the Allahabad High Court the *Shi'a* Law of pre-emption is to apply when both the vendor and the pre-emptor or either of them is a *Shi'a*. The Calcutta High Court in Jog Deb Singh, 32 Cal., 982 (1905) allowed the *Sunni* law to prevail where the vendor was a *Shi'a* and the pre-emptor was a *Sunni*.

The rule of *Shi'a* law that there is no right of pre-emption if there are more than two co-sharers is now firmly noted in the decisions of the Indian High Courts, however there are some passages in Querry Droit Musalman, Vol. II, pp. 275—278 *vide*

capita, but under the *Shafi'-i* law they are entitled to receive shares in proportion to the extent of their own shares.

4. It appears that according to the High Court of Allahabad both the seller and the pre-emptor must be Muslims, and the personal law of the purchaser is of no consequence. That the *Shi'a* law of pre-emption is to apply when both the vendor, and the pre-emptor or either of them is a *Shi'a*. According to the Calcutta High Court the vendor, the vendee and the pre-emptor should all be Muslims.[27]

also D.W., Kathalay, the Law of Pre-emption, p. 58, which indicates the contrary view and it is the same as the *Hanafi* Law.

[27] Ameer Ali, Vol. I, p. 728; Wilson, p. 382; Tyabji, pp. 663, 664; Abbasi, p. 33.

(*a*) Personal Law of the vendor:—

The seller must be governed by the law of pre-emption, *e.g.*, if a non-Muslim sells some property then there is no pre-emption under Anglo-Muhammadan Law.

(*b*) Personal Law of the vendee:—

If a Muslim sells some property to non-Muslim, according to Allahabad High Court there is pre-emption under the Muslim Law. Gobind Dayal *v*. Inayat Ullah, 7 All., 775. But according to Calcutta High Court there is no pre-emption at all. Kudrat Ullah *v*. Mahini Mohan Shaha (1869), 4 Beng. L.R., 134; 13 W.R., 21.

(*c*) Personal Law of the pre-emptor:—

The pre-emptor must be a Muslim to claim pre-emption under the Muslim Law. A *Shi'a* however cannot claim pre-emption on the ground of vicinage, even if the seller and purchaser were *Sunni* Muslims. Qurban Husain, 22 All., 102. But *vide* Rokaiya Begam *v*. Ahmadi Khanum (1912), 9 A.L.J.R., 769, where a purchaser a *Shi'a* woman was allowed to defend the suit on the ground that she was a *Shafi'-i-khalit* and the *Sunni* pre-emptor was also a *khalit* and the pre-emptor's contention that under the *Shi'a* law *khalits* have no right of pre-emption was rejected by the Court.

According to previous decisions of the Allahabad Court the right of pre-emption could be enforced even if the seller was a Hindu. Chundo *v*. Hakeem Alimoddeen (1873), Agra F.B., 305; 6 N.-W.P., 28. The last case was overruled in Dwarka Das, 1 All., 564 (Stuart, J. and Pearson, J. dissenting); but there is

However under the *Hanafi* Law a Muslim pre-emptor is entitled to pre-empt the property irrespective of the fact whether the vendor and vendee are both or either of them is a non-Muslim.

5. The right of pre-emption takes place when some property subject to pre-emptive right is transferred by a valid sale,[28] or by some means equivalent to a valid sale.

no doubt that the earlier cases were in conformity with the Muhammadan Law. As regards Bihar it has been held by the Privy Council in Jadu Lal Sahu *v.* Janki Koer, 9 A.L.J.R., 525, 39 I.A., 101; that "in Bihar the right of pre-emption under the Muhammadan Law is enforceable irrespective of persuasion of the pre-emptor, vendor and vendee."

Under the *Hanafi* Law a *Muslim* and a *Zemmi* (non-Muslim) are on equal footing in all cases regarding the privilege of pre-emption, and according to the *Shi'a* Law a non-Muslim may lawfully exercise the right against a non-Muslim but not against a Muslim.

[28] According to the Muslim Law sale means commutation of goods for goods, goods for money, of money for money, of money for goods. Sale is contracted by declaration and acceptance, the subject and consideration of sale must be determinate and the subject must be in actual existence. The Muslim Law does not prescribe any particular form for a sale transaction, but immediate delivery is necessary in the case of commutation of goods for goods and money for money and in the case of money for goods and goods for money a future period of delivery may be lawfully stipulated. There are five conditions which are natural to a contract of sale: (1) Option of acceptance, (2) condition of option, (3) option of determination, (4) option of inspection, (5) option from defect. If any extraneous condition is stipulated it makes the transaction an invalid sale. Hence the conception of sale under the Muslim Law is wider than the conception of sale under the Transfer of Property Act, Section 54, in fact it includes the definition of exchange as defined in Section 118 of the Transfer of Property Act. In Begum *v.* Muhammad Yaqub, 16 All., 344., F.B. citing original authorities the Allahabad High Court has held that the sale must be complete according to the Muslim Law. However in this very case Mr. Justice Banerji took the contrary view, and similar view was expressed by Mr. Justice Mahmood in Janki *v.* Girjadat (1884), 7 All., 482 F.B. The Calcutta High Court in Budhai Sardar *v.* Sana Ullah (1914), 41 Cal., 943 and the Patna High Court in Kheyali *v.* Mullick Nazarul Alum (1916), 1 Pat. L.J., 174, did not accept the view of the Allahabad High Court and held that Sec. 54 of the Transfer of Property Act embodies the general law which is paramount and supersedes the Muslim Law. In Abdullah

There must be an exchange of property for property or money and there must be an entire cessation of the vendor's interest.

6. There is no right of pre-emption in an invalid sale[29] so long as the invalidating circumstances or conditions

v. Ismail (1922), 46, Bombay, 302, the Bombay High Court preferred the view of the Allahabad High Court and held that a right of pre-emption arose in the case of an oral agreement to sell followed by payment of price and delivery of possession to the vendee even though no registered sale-deed was executed. It seems that the difficulty could be solved in each case by determining the actual intention of the parties *vide* Sitaram *v.* Jiaul Hasan, 45 Bom., 1056 (P.C.). However as a matter of fact almost all transfers of property are generally made in conformity with the provisions of the Transfer of Property Act, and they are duly executed and registered.

It should be noted that the view taken by the Allahabad High Court would cover all instances of fraudulent omission to register. If the ostensible sale is really fictitious then the ownership remains with the vendor, Mansur Ali *v.* Haider Husain, 4 A.W.N., 128.

When the property is to be exchanged for some perishable object or for articles of quantity or measures of weight then the pre-emptor is entitled to give its value in lieu ot it.

[29] Baillie, Part I, p. 476; Sircar, T.L.L. (1873), pp. 512-513; Abbasi, p. 24.

It is to be determined under the Muslim Law as to what is an invalid sale, as for instance by reason of uncertainty in price or the time for delivery of the property sold. Najam-un-nissa *v.* Ajaib Ali, 22 All., 343 is a good case to illustrate what is an invalid sale and its effect on ownership of the vendee. The facts are that Aminullah sold a house and site to Ajaib Ali stipulating Rs. 84 for the site and a further sum for the house to be ascertained by carpenters or masons appointed by the vendor and the vendee, and upon the additional sum being paid possession of the house would be made over within 10 days. This transaction took place by a registered contract of sale on the 17th May, 1895. Abrar Husain, the owner of adjacent houses, sold his property to Najam-un-nissa on the 14th July, 1896. Ajaib Ali instituted a suit for specific performance and eventually obtained possession of the house on the 6th of September, 1896. Najam-un-nissa and Ajaib Ali sued one another, each claiming a right of pre-emption against the other. The Court held quite correctly. That Ajaib Ali did not become owner of the house purchased by him until the 6th September, 1896, and therefore he was not entitled to claim pre-emption against Najam-un-nissa when she purchased her houses on the 14th July, 1896, and that Najam-un-nissa was entitl-

continue to exist. The right of pre-emption arises when the vendee exercises his right of ownership, and obtains possession of the property or erects a building or plants trees on it.[30] However in no case ownership relates back to the date of the original contract for sale or of sale. The ownership of the vendee dates from the date of his taking possession of the property.

There is no right of pre-emption in a sale with reservation of an option of repudiation for the vendor,[31] until the option drops, but there is a right of pre-emption in a sale under a condition of option to the vendee, for in the latter case there is a complete extinction of the vendor's interest.

If the sale is subjected to the option of a third person then the right of pre-emption arises after the sale is confirmed by him.

7. The right[32] of pre-emption does not arise out of

ed on the sale to Ajaib Ali becoming complete on the 6th September to claim pre-emption against him.

[30] According to the *Fatawa-i-'Alamgiri* the mere fact of taking possession is not sufficient at all, it mentions the case of erecting a house along with taking possession.

[31] If a certain property was sold subject to the option of the vendor and subsequently an adjacent house to this property is sold, then the vendor is entitled to pre-empt the house because the vendor's interest in the property sold has not yet ceased; but if the property was sold subject to the option of the vendee then the vendor is not entitled to claim pre-emption and in this case the vendee may lawfully pre-empt the house.

Similarly if a certain property was sold by an invalid sale then if the property was still in the possession of the vendor he is entitled to pre-empt an adjacent house sold to this property, and the vendee is not allowed to pre-empt it. But if the property was in the possession of the vendee he may lawfully claim pre-emption, and in this case the vendor has no right to claim pre-emption.

[32] Baillie, Part I, p. 475; Wilson, pp. 389-390; Agarwala, p. 19.

Property alienated by a simple gift is exempted from pre-emption, but in the case of gift amounting to sale or disguised as a sale, pre-emption is permitted. Angan Lal *v.* Muhammad Husain, 13 All., 409 F.B.

inheritance, gift, *sadaqa* (pious gift) bequest,[33] *waqf*[34] (charity) and lease.[35]

In the case of gift with a condition of return *Hiba-bi-shartil-'iwaz* after possession has been taken on both sides the right of pre-emption arises.

8. In the case of mortgage the right of pre-emption arises after the equity of redemption has been foreclosed.[36]

If A makes a gift of property to B and B subsequently makes a gift of his own property to A, then no right of pre-emption arises. This is *Hiba-bil-'iwaz*. It is a mere exchange of presents.

If A makes a gift and there is a distinct understanding that B is to make a return this transaction amounts to an exchange, *Hiba-bi-shartil-'iwaz*. This right of pre-emption arises. But if B fails to make the stipulated return or A refuses to accept the return (whether A has the right to refuse is a doubtful point) then the transaction amounts to a simple gift and there is no pre-emption. To fall under *Hiba-bi-shartil-'iwaz* it is essential to stipulate for the return. 6 S.D.A., Beng., 34.

[33] If a person makes a *wasiyat* that the income of a certain property should be given to A, and the property itself to B, then if the adjoining house to this property is sold then B (and not A) only can claim to pre-empt that house.

[34] There is no pre-emption as regards *waqf* property, and there is no pre-emption in favour of *waqf* property. There is a Punjab ruling to the effect that the *Mutawalli* of a mosque could pre-empt. Jind Ram *v*. Hussain Baksh, 49 Punjab Rec. 197 (1914). This decision was however under the statutory law although it was discussed as a question of Muhammadan Law.

[35] Mooroolee Ram *v*. Haree Ram, 8 W.R., 106.

The rent reserved was only one rupee per annum. Ram Golam *v*. Narsingh, 25 W.R., 43 and Dewanutullah *v*. Kureem Molla, 15 Cal., 184. But dressing up a sale in the garb of a lease cannot defeat the right of pre-emption. Muhammad Niaz, 40 All., 322 (1918).

[36] Wilson, p. 390; Agarwala, p. 34; Tyabji, p. 674.

If the mortgage be such that a decree for sale would be passed then the right of pre-emption arises when the sale becomes absolute under Order 34, Rule 5 or 8 of the Civil Procedure Code. The leading cases are: Batul Begam *v*. Mansur Ali Khan, 20 All., 315 F.B.; affirmed by the Privy Council in 24 All., 17; approved by the Punjab Chief Court F.B., in P.R. (1901), No. 103, Ali Abbas *v*. Kalka Prasad, 14 All., 405 F.B.

It has been held that the cause of action arises on the expiration of the year of grace and that till then the pre-emptor is to wait. No right of pre-emption arises if the mortgagor remains

If a mortgagor sells the mortgaged property with its encumbrances or the equity of redemption the right of pre-emption arises.

In the case of release from debt the right of pre-emption arises, *e.g.*, where a debtor gives some property to his creditor on condition that he shall release him from the debt.[37]

9. There is no right of pre-emption in the case of partition of the property amongst co-sharers of a certain undivided immoveable property.[38]

---

in possession of the property under an agreement arrived at before the expiration of the period of foreclosure. If an *ex parte* decree was passed, and a suit for pre-emption was instituted, and subsequently the *ex parte* decree is set aside and the mortgagor pays the amount, then the suit of pre-emption should be dismissed.

In the case of mortgage by conditional sale the right of pre-emption arises when the conditional sale becomes absolute. Ajaib Nath (1888), 11 All., 164. The pre-emptor may show that an ostensible mortgage is in fact a sale transaction, P.R. (1904), No. 78 and P.R. (1906), No. 145.

[37] In the case of assignment of property for payment of debts if the property is made over in complete discharge of the debts then such a transaction practically amounts to a sale. When however the property is handed over to the trustees to manage the property and pay off the debt and then return the property to the debtor, it is not a sale and there is no pre-emption. Outar Singh *v.* Musammat Ablakhee, 2 Agra, 328.

[38] Tyabji, p. 706, and Agarwala, p. 68.

Partition ends the right of a *sharik*, it destroys co-parcenary body. To extinguish the partners' right of *Shuf'a* it is necessary that a formal division has taken place. For instance if the separation is merely of rent then it is not enough. In Karam Ali *v.* Amir Ali, 3 C.L.R., 166, two co-sharers paid rent separately to the zamindar by arrangements though the lands continued joint. The Court held that such a partition did not destroy their mutual rights of pre-emption. Similarly in Gureeboolah Khan *v.* Kebul, 13 W.R., 125, the Court held, that where two co-sharers were merely paying rents separately in respect of an original *jama*, the right of pre-emption *inter se* existed. However if each partner is made owner of his share and the boundary of each partner is marked and defined then the right of *Shuf'a* is completely destroyed. Wahid Ali *v.* Hunoman, 12 W.R., 484. A divided co-sharer cannot claim *Shuf'a* on the ground of *Shafi'-i-khalit*. Mahadeo Singh *v.* Zait-un-nissa, 7 B.L.R., 45; 11 W.R.,

10. There is no right of pre-emption in the property assigned by a husband to his wife as her dower, but a transfer of property in lieu of the dower-debt itself does give rise to the right of pre-emption.[39]

Where a marriage was contracted without dower having been agreed, and thereafter the husband transfers some property in lieu of *Mahr-ul-misl*, dower of her equals the right of pre-emption arises. However if the husband transfers some immoveable property to his wife in lieu of relinquishment of her right to claim dower then the right of pre-emption does not arise.[40] If the wife, to obtain a *khulla* divorce, assigns immoveable property to her hus-

169. Perfect partition divides one *mahal*. Lala Puriag Dutt *v*. Bundeh Hossein, 15 W.R., 225, on review, 16 W.R., 110.

[39] Agarwala, p. 23; Sircar, T.L.L. (1873), p. 511; Wilson, p. 390; Tyabji, p. 669; Ameer Ali, Vol. I, p. 713.

Fida Ali *v*. Muzaffar Ali, 5 All., 65. 2 A.W.N., 175. Following Peare Begum *v*. Sheikh Hushmat Ali, N.W.R.S.D. A.R., 1864, Vol. I, p. 475. Where it was held—" Price as a term of Muhammadan Law includes not only money, but also any other kind of property capable of being valued at a definite sum of money. But when a transfer of property takes place for a consideration not capable of being estimated at a definite money value such transfer is not regarded as sale at all and does not give rise to the right of pre-emption. Therefore when a man marrying a woman does not fix the amount of dower at a money value, but assigns property to her as her dower, the right of pre-emption cannot have any operation the transfer not being a sale and the consideration thereof being unascertained and unascertainable at a definite money value. But no such impediment to the operation of the right of pre-emption exists in cases in which the dower was originally fixed at an ascertained sum and the property is subsequently sold in lieu of a part or the whole of such amount."

[40] This is an instance of *Hiba-bil-'iwaz* and consequently the right of pre-emption does not arise.

In Ram Prasad *v*. Rahat Bibi, 18 O.C., 367, a Muhammadan transferred some property to his wife in lieu of relinquishment of her claim to dower it was held that the transaction was not one of sale but of *Hiba-bil-'iwaz*. There was an exchange of gift. The husband gave certain property and the wife gave relinquishment of her claim to dower.

According to the Egyptain Act of 1900, Art. 3, a sale between husband and wife or between ascendants and descendants or

band the right of pre-emption does not arise. Under the *Shafi'i* Law the right of pre-emption arises in all these cases.

11. Under Anglo-Muhammadan Law, there is no pre-emption if a transfer is effected by a decree:

there is a difference of opinion whether a sale in execution of a decree gives rise to a right of pre-emption[41];

there is no right of pre-emption upon a transfer effected by virtue of a compromise decree in a pre-emption suit.[42]

According to the *Hanafi* Law it is submitted that in such cases a right of pre-emption arises.

between relations within three degrees is not pre-emptible. Andre Marneurs' La Chefa, p. 75.

A widow in possession of her deceased husband's property in lieu of her dower is not owner of the property for her possession is determined on payment of the dower debt, or by satisfaction of the dower debt from the income of the property; therefore she by reason of her possession cannot claim pre-emption. Khairunnissa *v.* Amin, 7 A.W.N., 93. But if the widow was in possession of the property partly as her share by right of inheritance then on the latter ground she can lawfully exercise her right of pre-emption. Nabi Bax *v.* Medu, 2 A.L.J.R., 775.

[41] Tyabji, p. 670. For the affirmative, Imam Ooddeen Sowdagar *v.* Abdul Sobhan (1866), 5 W.R., 169; where part of an estate is sold in execution of a decree a co-sharer is entitled to the right of pre-emption. In the negative, Nuzmooddeen *v.* Kanye Jha (1863), Marsh, 555, 2 Hay, 651, Abdul Jalil *v.* Khellat Chunder Ghose (1868), 10 W.R., 165, because the partner or neighbour had an opportunity to bid at the sale.

[42] Hanuman Rai *v.* Udit Narain, 7 All., 917, and Abdul Razaq *v.* Mumtaz Husain, 25 All., 334, support this view. In the latter case the Court held "Pre-emptive right is a right to step into the shoes of a less qualified vendee or transferee and therefore there must be such a person acquiring property by a contractual relation of sale or transfer." The Punjab Court has taken the same view. Khiman *v.* Alladad, 18 I.C., 957; but in this case the pre-emptor was not a party to the compromise decree. The facts are M and A sold certain land to Alladad Khan whereupon Mustafa Husain instituted a suit for pre-emption. The parties arrived at a compromise, the vendee agreeing to give up to Mustafa Khan a part of the land on payment of Rs. 400, later on Khiman instituted the present suit to pre-empt the land which Mustafa Khan obtained in virtue of the agreement. The

According to the *Hanafi* Law a transfer effected by the decree compounding a claim gives rise to the right of pre-emption. If a person claims ownership of a certain property and the owner compounds the claim by paying a certain sum, then it amounts to an admission and is equivalent to sale, and the right of pre-emption arises. But if the owner neither admits the claim nor denies it, but to save the bother of litigation, pays the amount, then in this case there is no right of pre-emption.

12. The right of pre-emption is not established unless the pre-emptor on hearing of the transfer from some trustworthy source makes the demands of pre-emption in the following order[43] :—

The demands are of three kinds[44] :

1. *Talab-i-muwasabat* or immediate demand.

---

case was under the Punjab Pre-emption Act, but the suit was dismissed on the support of the Allahabad decision. However it is submitted that under the *Hanafi* Law the property could be pre-empted. In Intizar Husain *v.* Jamna Prasad, 1 A.L.J.R., 247, it was again held that a right of pre-emption does not arise upon a transfer effected by virtue of a decree though the decree is passed upon a compromise. Under the *Hanafi* Law of Pre-emption it can in my opinion be successfully argued that such a compromise decree resembles the accepted case compounding a claim for consideration where the right of pre-emption arises. A claims ownership of a house. B compounds the claim by payment. This amounts to a sale, hence the right of pre-emption arises in favour of the pre-emptor. However this example is a general one. I disagree from the view taken in 1 A.L.J.R., 247 and 18 I.C., 957, but I support 7 All., 917 and 25 All., 334 for these decisions are clear as the claim was made by the pre-emptors who happened to be parties to the compromise decree itself, and this fact obviously bars their subsequent demand to claim pre-emption.

[43] Baillie, Part I, p. 487; Sircar, T.L.L. (1873), pp. 520—527; Ameer Ali, Vol. I, p. 724; Dayal, p. 386; Abbasi, p. 88; Agarwala, p. 95; Wilson, 394; Tyabji, pp. 682—688.

That is on hearing from two men or one man and two women; or one trustworthy man, or from the vendee or vendor's agent or by a letter.

[44] Strictly speaking this is a branch of the Muslim Law of procedure and the courts in British India should not be bound by technical rules of the Muslim Law. The justification for the

2. *Talab-i-'ishhad* or *'Istishhad* or demand with invocation also known as *Talab-i-taqrir* confirmatory demand.

3. *Talab-i-tamlik* or demand of possession also known as *Talab-i-khusumat* or demand by litigation.

The demands of pre-emption may be made by the pre-emptor himself or his authorised agent or his lawful guardian if he be a minor, or by the manager of a Court of Wards.[45]

The distinction between *Talab-i-muwasabat* and *Talab-i-'ishhad* is not recognised by the *Shi'a* law, all that is necessary is that the pre-emptor should prefer his claim.

Under Anglo-Muhammadan Law, the fraudulent or otherwise omission to register the sale-deed does not affect the demands of pre-emption which could be made immediately after the execution of the deed, and they are also valid if made after registration of the sale-deed, as required by Sec. 54 of the Transfer of Property Act.[46]

13. The *Talab-i-muwasabat* should be made without the least possible delay, in fact, immediately after the fact of transfer of property comes within the knowledge of the

---

demands and invocation of witnesses as required by the *Hanafi* law, has as a matter of fact now ceased to exist.

[45] Jadu Lal v. Janki Koer, 1908, 35 Cal., 575; 39 Cal., 915; 39 I.A., 101.

[46] In Zamani Begum v. Khan Muhammad Khan (1923), 46 All., 142, it was held that the demands made after the execution of the sale-deed but before registration were not premature or defective. In Budhai v. Sanullah (1914), 41 Cal., 943, the pre-emptor after the execution of the sale-deed did not make the demands of pre-emption, it was held that he was not bound to make the demands, and that his right did not arise till he became aware of the registration of the sale-deed.

pre-emptor,[47] and any words indicative of intention to pre-empt the property are sufficient.[48]

14. The *Talab-i-'ishhad* should be made with the least possible delay.[49]

(i) In the presence of witnesses called upon to bear witness to it ;

(ii) on the premises, the subject of pre-emption, or

---

[47] In Ali Muhammad *v.* Taj Muhammad, a delay of 12 hours was held to be too long. In Amjad Hossein case, 4 B.L.R. A.C. (1870), it was held that a pre-emptor may take a *short time* to ascertain the information conveyed to him before making the *Talab-i-muwasabat*.

According to the Maliki School the pre-emptor can spend one hour for inspecting the subject of sale before making the demand of pre-emption. Code Musalman, section 900; D. W. Kathalay, The Law of Pre-emption, p. 134.

[48] Followed in Muhammad Nazir Khan, 34 All., 53 (1911), distinguishing Muhammad Abdul Rahman Khan, 8 A.L.J.R., 270 (1903).

Whether the *Talab-i-muwasabat* may be made through an agent is a disputed question. According to the Bengal Sadar Dewani Adalat the performance of the first demand through another is not a valid compliance with the law. Moyemoodden *v.* Ihlaroodeen (1847), Ben. S. D. A.R., 267, Meer Syed Alee *v.* Sheikh Muhammad (1857), 13 Ben. S.D.A.R., 1172. The Allahabad High Court has however held that the first demand can be made by a general attorney. In Munna Khan *v.* Cheeda Singh (1906), 28 All., 690, the demand was made by the brother of the pre-emptor *vide* also Abadi Begum, 1 All., 521.

[49] According to Imam Muhammad *Talab-i-'ishhad* must be made within three days; according to Imam *Shafi'i* there is no limitation at all *vide* the *Majma'-ul-Bahrain.*

It is submitted that what is the least practicable delay is a question of fact to be determined in each particular case.

In Nathu *v.* Shedi, 37 All., 522, 13 A.L.J.R., 714, it was held, that if at the time of *Talab-i-muwasabat* the pre-emptor invoked witnesses in the presence of vendor or vendee or on the premises to attest the immediate demand it would be sufficient and *Talab-i-'ishhad* was not necessary. This is according to the *Durrul-Mukhtar* also.

In Inayat Khan *v.* Muhammad Yosuf, 10 A.L.J.R., 92, it was held that in the case *Talab-i-'ishhad* is made before the seller who was not in possession of the property the demand was not made properly.

in the presence of the vendor provided he is in possession of the property, or before the vendee.

It is also necessary to refer to the *Talab-i-muwasabat* having been duly made.[50]

Talab-i-'ishhad may be made by a duly appointed agent.[51]

15. The above preliminary demands having been made, the pre-emptor must make *talab-i-tamlik*, that is, file the suit in a Court of Justice [52]

(i) within a year of the purchaser taking possession of the property, and

(ii) where the subject of the sale does not ad-

In Muhammad Khalil *v.* Muhammad Ibrahim, 14 A.L.J.R., 148, 38 All., 201, it was held that *Talab-i-'ishhad* cannot be made by a letter where it was possible for the pre-emptor to make the same personally.

[50] This point was fully discussed in Rujjab Ali Chopdar *v.* Chund Churn Bhadse, 17 Cal., 543 F.B. Akbar Husain 16 All., 383 (1894); Abbasi Begum, 20 All., 457 (1898), Abid Husain, 20 All., 499, and Mubarak Husain, 27 All., 163 (1904).

In Ahmad Hakim *v.* Mohammad Hikmat Ullah, 25 A.L.J.R., 312 (1927), the pre-emptor omitted to ask the witnesses to bear testimony. It was held that the omission was not fatal.

[51] *Talab-i-'ishhad* may be performed by an agent duly appointed. He may write a letter appointing an agent, Wajid Ali Khan, 4 B.L.R.A.C., 139 (1870); Imamuddin, 6 B.L.R., 167; Abadi Begum, 1 All., 521 (1877); Ali Muhammad Khan, 18 All., 309 (1896). But a letter direct to the vendor or vendee is not sufficient. Muhammad Khalil, 38 All., 201 (1916). Any act or omission by the agent has the same effect as that by the pre-emptor himself.

[52] Limitation Act IX, 1908, Schedule II, Art. 10. The Limitation Act supersedes the Muhammadan Law.

The starting point for limitation is when " physical possession " (the term used in Art. 10 of the Limitation Act) is taken of the whole property; if the property is not susceptible of physical possession then from the time of the registration of the sale-deed. In this case Art. 120 will apply—Ali Abbas *v.* Kalka Prasad, 14 All., 405, Batul Begum *v.* Mansur Ali, 20 All., 315; affirmed in 24 All., 17 P.C. In the latter case the term " physical possession " was fully discussed.

mit of physical possession within a year of registration of the instrument of sale.

The vendee is a necessary party to the suit, but the vendor is not a necessary party to the suit unless he is in possession of the property.

16. (i) A pre-emptor need not tender the purchase-money at the time of asserting or demanding pre-emption. It is sufficient that he is prepared to pay the sale consideration stated in the deed, or if he suspects it then the amount determined by the Court should be paid by him.[53] The sum decreed need not be paid if the pre-emptor prefers an appeal. The pre-emptor is not liable to the vendee for any such contingent charges as brokerage or agency.

According to Imam Muhammad the period for instituting the suit is one month except under lawful excuse. The period of limitation fixed by the Indian law agrees with the one year limit of Imam Malik.

Where a suit was instituted on the last date allowed by pre-emption and subsequently amended it was held not to be time-barred—Muhammad Sadiq, 33 All., 616 (1922).

A, B and C were joint owners of a share; C was a minor. A and B sold the entire property to D. Then E sued A, B and D for pre-emption and obtained a decree and possession of the property. C then brought a suit and recovered his share. C then sued E for pre-emption. Held that the time began to run against C from the date of the original sale to D, that the suit was barred under Art. 10, Act XV of 1877. Yawar Husain *v.* Abdul Kadir, 2 A.L.J.R., 151.

The pre-emptor instituted a suit against A and B on the 27th February, 1909, on the allegation that they had jointly purchased the property, subject of pre-emption, by a sale-deed on 3rd April, 1908. As a matter of fact the name of one of the vendees was C and not B. Hence on the 8th of April C was made a party to the suit as defendant. Held that the suit against C was barred by limitation and that since the sale was joint the suit was barred against A also. Mamraj Singh *v.* Hirday Ram, 8 A.L.J.R., 814. *Vide* also Mehdi Hasan, 13 A.L.J.R., 383.

[53] Baillie, Part I, p. 494; Wilson, p. 400; Agarwala, p. 104.

Nubee Baksh *v.* Kaloo, 22 W. R., 668; 1 A. W. N., 44; Khoffejan *v.* Mahomed Mehdee, 10 W.R., 211. *Prima facie* the consideration in the sale-deed should be taken as the true consideration. Under Anglo-Muhammadan Law, there is no objection

(ii) If after valid sale the vendor has reduced the price then the pre-emptor is entitled to claim the benefit of this abatement.[54] If the vendee on discovering a pre-existing defect does not avoid the sale, but elects to demand compensation from the vendor then the pre-emptor is also entitled to abatement thus effected in the price.

Under the *Shi'a* Law the pre-emptor is not entitled to the benefit of the abatement.[55]

(iii) If after a valid sale the vendor foregoes the entire sale consideration in favour of the vendee, then the pre-emptor cannot claim the benefit of the whole remission, but he is entitled to pre-empt the property at its original price.[56]

(iv) If after a valid sale the vendee increases the sale consideration in favour of the vendor then the pre-emptor is not liable for such augmentation.

(v) If the vendor has sold the property on credit[57] to the vendee then the pre-emptor may either wait, until the period has expired and then pre-empt the property, or he may take the property immediately on payment of the sale consideration. The pre-emptor should however make the demands of *Shuf'a* immediately as in other cases, the execution of the claim may be delayed till the

---

to fancy price being paid to prevent the pre-emption. B. E. O'Coner *v.* Ghulam Haider, 3 A.L.J.R., 365; 28 All., 617.

The price is usually paid to the vendee by the pre-emptor. In Wazir Khan, 16 All., 126 (1893), the question was whether the money could be paid to discharge a mortgage debt.

According to *Imam Shafi'i* the price is to be paid within three days after the decree of the Kazi and according to Imam Malik and Imam Ahmad within two days after the decree and under the *Hanafi* Law the period is fixed by the Kazi.

[54] Abbasi, p. 109; Agarwala, p. 107; Tyabji, pp. 720-721. Tajammul Husain *v.* Uda, 3 All., 668, I. A. W. N., 44.

[55] Baillie, Part II, p. 183; Querry, II, p. 279, Sec. 53.

[56] S. D. A. N. W. (1860), 538.

[57] Baillie, Part I, p. 497; Tyabji, p. 723 and p. 680.

expiration of the period. The *Shi'a* and the *Shafi'i* jurists hold that the pre-emptor can claim the benefit of the condition of sale on credit.[58]

17. If the pre-emptor was misinformed about the sale consideration, or of the purchase, or of the property actually sold, and he thereupon relinquished his right and later on he became aware of the true facts then his right of pre-emption is not invalidated by his previous submission or surrender.

18. The pre-emptor must pre-empt the whole of the property sold. Partial pre-emption is not allowed.[59]

19. There are some well-known exceptions to the rule against partial pre-emption.

(i) If several persons have purchased a certain property from one man then the pre-emptor may take the share of any one of them.[60] If however one man has

---

[58] Baillie, Part II, p. 177; Querry, II, p. 272, Secs. 12 and 13.

Mr. Yusuf Ali, editor of Wilson's Digest (p. 387), adopts the view of the *Shafi'i* jurists, but in previous editions Sir Roland Wilson affirmed the view of the *Hanafi* jurists.

[59] Baillie, Part I, pp. 498-499; Wilson, p. 393; Tyabji, pp. 699—702; Abbasi, p. 107; Agarwala, pp. 118—134.

The Code of Civil Ottomon, Art. 104, also adopts this view.

Pre-emption of a part was not allowed in S. D. A. W. P., 156, N. W. S. D. A., Dec., Vol. VI, 132; S. D. N. W. (1863), 394; Cazee Ali *v.* Museeut Ullah, 2 W. R., 285; Gufoor *v.* Nur Banu, 10 W. R., 111; Durga Prasad *v.* Munsi, 6 All., 423 (1884); Izzat Ullah *v.* Bhikari Molla (1870); 6 Beng. L. R., 386; 14 W.R., 469, Raghunandan Singh *v.* Majbuth Singh (1863), 10 W. R., 379; 6 Beng. L. R., 387.

In L. A. Puech *v.* Aziz Fatima, 19 A. L. J. R., 107.—A plot of land was sold together with a house; the pre-emptor sued to pre-empt only so much of the land as was not covered by the house. The suit failed on the ground of partial pre-emption.

[60] A, B and C have purchased the property from D. E is the pre-emptor to the property sold. E if he prefers may pre-empt the share of B only.

Where several persons purchased some property, the pre-emptor is entitled to pre-empt the whole property or share of one of such purchasers by making the demand to him alone. It has

purchased a certain property from several persons then the pre-emptor is not entitled to pre-empt under the *Hanafi* Law, any particular share of the vendors but he can do so under the *Shafi'i* Law.

(ii) If several owners of different properties combine and sell their properties by one sale-deed for a single sale consideration to one man, then a pre-emptor of one of such properties may pre-empt that particular property only.[61] If he happens to be a common pre-emptor of all different properties sold, then it is submitted that he should pre-empt all, that is, he cannot pre-empt any property which he may prefer.

(iii) If a person by one sale-deed for one sale consideration sells two distinct properties situated in two different cities then if there is a common pre-emptor to both these properties he must pre-empt both of them, that is, he cannot pre-empt one of the properties only. But if

---

been recently held by the Allahabad High Court that "Where the first demand was made to all the vendees but the second demand was made only to one of them then the pre-emptor was entitled to claim pre-emption against that vendee only." Muhammad Askari *v.* Rahmat Ullah, 25 A.L.J.R., 473 (1927), and *vide* also Aliman *v.* Ali Husain (1923), 45 All., 449. The best, and the easiest course for the pre-emptor would be to make the demand at the site, which would apply to all vendees. However *vide* Gunpat Jha *v.* Anund Singh [Decisions of the Sudder Dewanny Adalat (1848), Bengal, p. 22] where the making of the second demand in the presence of one of several sellers was held to be valid, and *vide* Brij Beharee Singh *v.* Durbari Lal [Decisions of the Sudder Dewanny Adalat (1850), Bengal, p. 585] where it was held that it was not necessary for the pre-emptors to prove that they had preferred their claim to one or other of the joint purchasers or sellers. It is difficult to find a clear text on this point from the original authorities; however in my opinion the intention of the pre-emptor should be the determining factor, and the rule that the singular includes the plural may be applied but not as a general rule.

[61] X. Y. Z., owners of different properties have sold by one sale-deed their properties to M. And N is the pre-emptor of the property sold by Y, hence N may lawfully pre-empt that property.

these properties were sold by two sale-deeds then he could pre-empt either of them. However if there is a pre-emptor to one of such properties only then the better opinion is that he could pre-empt that property.[62]

If a person by one sale-deed has sold two or more properties in the same city then if the pre-emptor happens to be a *khalit* in the right of way, he cannot pre-empt one of them only, but if he happens to be a *jar* to one of such properties then he is entitled to pre-empt that particular property only.

Similarly if a certain property was exchanged for another property then the pre-emptor of each of them could pre-empt that particular property, and if there is a common pre-emptor he must pre-empt both the properties comprised in one transaction.[63]

---

[62] In Mohammad Wilayat *v.* Abdul Rab (1889), 11 All., 108, followed in Mujib Ullah *v.* Umid Bibi (1899), 21 All., 119, a very interesting point was discussed. By one sale-deed two distinct properties one in a village and the other in the city of Moradabad, were sold and for which one price was paid. The property situated in the city was pre-empted under the Muslim Law and the village property under the *wajib-ul-'arz*. The Court held: In the view we take the plaintiff was disqualified from claiming the property in Moradabad, and we think that disqualification would prevent him from maintaining his suit for any portion of this property which was included in one common sale." This decision can be supported from the original authorities. The *Majma'-ul-Bahrain* however says that according to Imam Zafr the pre-emptor could pre-empt one of the properties sold. However, if the properties were sold under one sale-deed, but the price of each property was separately specified, then it may be argued that the transaction amounted to a distinct sale of each of the properties, hence a common pre-emptor may pre-empt one such property. This appears to be the opinion of the Allahabad High Court in Lachman *v.* Tulshi Ram, 2 A.L.J.R., 199.

[63] The property A is exchanged for the property B. Then on paying the value of the property B the pre-emptor of A may pre-empt the property A and the pre-emptor of B may pre-empt the property B on payment of the ascertained value of the property A. But if there was a common pre-emptor then it is sub-

(iv) If the pre-emptor discovers that his own property has been wrongfully included in the sale then he may lawfully claim his own property as owner and the remaining portion by way of pre-emption.[64]

If the pre-emptor discovers that the title of the vendor is defective as to a portion of the property then he may claim pre-emption as to the rest of the property only ; but he shall conclusively establish that the vendor had no title to that portion before the suit is decreed.[65]

(v) If a certain property belongs to four partners, and the vendee during the absence of one of the partners purchases three shares one after another from three partners, and thereafter the fourth partner appears, then he is entitled to pre-empt the first sale, but as regards the second and the third transactions he and the vendee both would be considered as equal pre-emptors.

---

mitted on the analogy of the case of sale of two properties by one sale-deed that both the properties must be pre-empted if at all. The actual case of exchange is not (within my knowledge) covered by any original text, but the case of the sale is based on the texts.

[64] In Bhagwati Saran *v.* Parmeshar Das, 36 All., 476, it was held that there was no defect in the frame of the suit if the plaintiff claimed the property as full owner and in the alternative for pre-emption. And in Abdul Aziz *v.* Maryam Bibi, 25 A.L.J.R., 48 (927), it was held that " the causes of action for claiming possession of his own property and for claiming pre-emption of the vendor's property are separate and distinct and there is no ground for not allowing the plaintiff to combine the two in one and the same suit. However it is not permitted for the pre-emptor to completely deny the title of the vendor, because the vendee took the property with all the risks and the pre-emptor must offer to be substituted completely in his place." Sahodra Bibi *v.* Bageshri Singh, 37 All., 529; 13 A.L.J.R., 711, and Iqbal Haider *v.* Musammat Wasi Fatima Bibi, 45 All., 53. The important condition under the Muslim Law is that the pre-emptor should conclusively establish that the vendor had no title to the rest of the property in order to succeed, in pre-empting a portion of the property only.

[65] Badri Prasad *v.* Khuwaja Muhammad Husain, 11 A.W.N., 44.

(vi) It appears that under Anglo-Muhammadan Law, if the vendee happens to be a pre-emptor of equal degree then the other pre-emptors may lawfully pre-empt to have the property divided equally between all of them.[66]

20. When two or more persons are entitled to the right of *Shuf'a* in a property then each of them must pre-empt the whole property. The claim must be in its entirety, though the decree will be given in equal shares amongst all pre-emptors.[67]

21. When there are a number of pre-emptors, and some of them are absent, the property will be adjudged to all those present, but later on if the absentee appear and demand pre-emption they would be entitled to receive shares equal to the others, and if they belong to the superior grade then they would be entitled to claim the whole property.[68]

---

[66] In Abdullah *v.* Amanat Ullah, 19 A.W.N., 82. 21 All., 292 (1899). A property was sold to a vendee who happened to be a pre-emptor also, and five persons having equal right of pre-emption sued for $\frac{5}{6}$th of the property. It was contended that the suit should have been for the whole of the property. The Court overruled this contention. It appears to me to be a very doubtful decision, and it conflicts with the *Hanafi* Law, *vide* Sec. 20.

[67] Amir Hasan *v.* Rahim Baksh (1897), 19 All., 466, is an important case citing original authorities. In Sabq Ram *v.* Kali Shankar, 27 All., 465—A co-sharer had demanded pre-emption, and while the suit was pending another co-sharer having equal rights filed a similar suit for pre-emption of the same sale. Held that the second plaintiff was entitled to one-half of the property sold.

[68] Sircar, T.L.L. (1873), p. 519; Tyabji, p. 714.

In Raj Narain Rai *v.* Duniya Pande, 7 A.L.J.R., 259; 32 All., 340, some pre-emptors had obtained decrees and later on within limitation the pre-emptor of superior right brought a suit. Held that the suit was maintainable.

However after the period of limitation the superior pre-emptor would have no subsisting right to demand pre-emption. Where an inferior pre-emptor brought the suit on the last date of limitation and the property was *pendente lite* transferred to pre-emptors of superior class such a transfer cannot affect the right of the plaintiff to pre-empt the property, the superior pre-

22. A pre-emptor of equal degree cannot assign his share to one of the other pre-emptors. If he has assigned his right before the decree of the Court the property will nevertheless be equally divided amongst the pre-emptors who have preferred their claim.

23. If a pre-emptor has waived his right to pre-empt, then the other pre-emptors have a right to pre-empt the whole. But if the right has been perfected by the delivery of the property to a pre-emptor or by the decree of the Court then he has a separate and definite interest, and he may lawfully surrender it at will.

24. The pre-emptor has the option of inspection always, even after he has obtained a decree from the Court. And if he discovers a pre-existing defect he may avoid the sale.

25. The right of pre-emption cannot be established[69] :—

(i) if the pre-emptor has omitted to demand pre-emption or enforce his right ;

(ii) if he, of his own accord, has surrendered his right of pre-emption.

(iii) if he has acquiesced in the sale of the property.

---

emptors having their right barred by limitation and had lost their right on the date of the transfer. Asa Singh *v.* Naubat, 19 A.L.J.R., 143.

[69] Baillie, Part I, pp. 505—508; Sircar, T.L.L. (1873), p. 533; Ameer Ali, Vol. I, p. 733; Dayal, p. 395; Abbasi, p. 107; Tyabji, pp. 690—697.

The surrender of the right of pre-emption before the sale does not prevent pre-emption. Abadi Begam *v.* Inam Begum, 1 All., 521; Karim Baksh *v.* Khuda Baksh, 16 All., 247. The surrender of the right of *Shuf'a* may be conditional, *e.g.*, if the pre-emptor says I have surrendered my right provided you have purchased this property, so that if another has purchased the property in question the right is not extinguished. And likewise surrender due to mistake is invalid. Surrender and acquiescence are liable to be confused. The difference is that surrender is a legal plea,

The right of *Shuf'a* once relinquished cannot subsequently be resumed.

It is submitted that in certain circumstances refusal to purchase the property contemporaneously with, that is, at the time of the actual sale transaction,[70] extinguishes the

---

while acquiescence acts as an equitable estoppel (*vide* Thamansingh *v.* Jamaluddin, 7 All., 442). In Muhammad Nasiruddin *v.* Abdul Hasan, 16 All., 300, followed in Muhammad Yunas Khan *v.* Muhammad Yusuf, 19 All., 334, a pre-emptor asserted his right of pre-emption, and offered to take the property from the vendor with a view to avoid litigation. He cannot be said to have acquiesced in the sale and thereby waived his right. In Rupnarain *v.* Awadh Prasad, 7 All., 478—held that the right of pre-emption which arose upon the sale was a new right,.........the alleged acquiescence of the plaintiff pre-emptor occurred at a time when the right claimed by him was not yet in existence. Acquiescence in a mortgage by conditional sale does not mean acquiescence in the sale becoming absolute. This was a case under the *wajib-ul-'arz* giving a right of pre-mortgage but it is obvious that under Anglo-Muhammadan Law the right of pre-emption does not arise till the sale had become absolute.

The surrender of the right of pre-emption in favour of one person does not operate in favour of another.

The mere fact of attestation of the sale-deed by the father of the pre-emptor or by the pre-emptor does not imply concurrence in the sale. 1 Oudh Cases, 252; Hari Kishen Bhagal *v.* Kashi Prasad Singh (1914), 42 Cal., 876 (P.C.); Banga Chandra *v.* Gagat Kishore (1916), 44 Cal., 186 (P.C.). But under the Punjab Pre-emption Act attestation with full knowledge operates as equitable estoppel. P.R. (1903), No. 15.

[70] It may be argued that if the pre-emptor and the vendee make simultaneous offers for the same, and if the pre-emptor was aware of this fact and allowed the vendee to take the house at a higher price then his conduct would amount to equitable estoppel on the ground of acquiescence. If the pre-emptor preferred not to exercise his claim on one occasion of the sale of a certain property, he is not thereby precluded from pre-empting the same property on the subsequent sale of that property.

In Munawar Husain *v.* Khadim Ali, 5 A.L.J.R., p. 331, it was held, in order to debar the pre-emptive right an opportunity to purchase must be given to the pre-emptor when a definite agreement to purchase at a fixed price has been entered between the vendor and the vendee.

In Ghulam Mohiuddin Khan *v.* Hardeo Sahai, 18 A.L.J.R., 413; 42 All., 402; an insolvent's property was sold by public auction by the official assignee. The auction was notified and was within the knowledge of the pre-emptor, but he did not bid at the

right of pre-emption. Mere refusal to purchase before the sale does not destroy the right of pre-emption for the right of pre-emption arises after the sale.[71]

Similarly the right of pre-emption is destroyed if the pre-emptor takes from the vendee the same property, the subject-matter of pre-emption, on rent, or negotiates with the vendee for the purchase of the property to himself, or for its lease.

It is not necessary for the vendor to give notice to the pre-emptor, and offer to sell the property to him.[72]

---

sale; this was construed to be a refusal to purchase. This was a case under the *wajib-ul-'arz*, strictly speaking under the Muslim Law, it was incumbent on the official assignee to offer the property to the pre-emptor at the highest price bid at the auction.

[71] The mere fact that the pre-emptor refused to purchase before the price was settled does not debar his right of pre-emption (*vide* Kanhai Lal *v.* Kalka Prasad, 2 A.L.J.R., 390; 27 All., 670). Here the property was sold by a receiver. Subhagi *v.* Muhammad Ishaq, 6 All., 463; Kuldeep *v.* Ram Deen, 24 W.R., 198; Braj Kishore *v.* Kirti Chandra, 15 W.R., 247, and Toral *v.* Auchhi, 18 W.R., 10. And if the refusal was due to dispute about the price or *bona fide* belief that the price demanded was fictitious then the right remains subsisting if the sale actually takes place.

In Ahmad Ali *v.* Najmaunnisa, 2 A.L.J.R., 115, it was held that a mere fact that a pre-emptor accepts from the vendee mortgage-money due upon the property which is the subject of pre-emption does not amount in law to a waiver of his pre-emptive right.

According to the *Fatawa-i-Kazi Khan* and the *Durrul-Mukhtar* the pre-emptor may make an agreement with the vendee to purchase the property after some time. But in Habib-unnisa *v.* Barkat Ali, 8 All., 275; 6 A. W. N., 114, Mahmood, J. remarked that "when the pre-emptor enters into a compromise with the vendee or allows himself to take any benefit of him in respect of the property which is the subject of pre-emption, he, by so doing, is taken to have acquiesced in the sale and to have relinquished his pre-emptive right." In this case the venee had entered into an agreement with the pre-emptors that they would sell the property to the pre-emptors within a year, if the latter paid the price and purchased it for themselves.

[72] "It seems that according to the Maliki School the vendor is entitled to issue a notice to the pre-emptor through the Court, the purchaser can ask the pre-emptor whether he exercises his right or not. It is a moral duty of the vendor as well as of the

26. (i) If the pre-emptor together with a stranger has purchased a certain property then his right of pre-emption becomes void with respect to the purchased property.[73]

(ii) If the pre-emptor has associated with himself a stranger as co-plaintiff who has in fact no claim to pre-emption, then his right of pre-emption becomes void.[74] He has omitted a part of his claim, and so the whole of his right is extinguished.

---

purchaser to inform the pre-emptor the fact, about the sale, giving rise to the right, and this is what all God-fearing men will do but there is no legal obligation for doing this. In a case in which the purchaser summons the pre-emptor before the Law Court to exercise his right or to renounce it, the latter would be required to declare his intention immediately." Andre Marneur's La Chefa (p. 106), *vide* D. W. Kathalay, The Law of Pre-emption, p. 154.

[73] This was the view also held by the Sardar Diwany Adalat of the North-Western Provinces in Sheo Dyal *v.* Bhairo Ram (1860), 15 N.-W.P., S.D.A.R., 53, where it was held that a co-sharer purchasing property jointly with a stranger forfeited his pre-emptive right and rendered the entire sale liable to pre-emption by other co-sharers (*vide* also Guneshee Lal *v.* Zaryat Ali (1870), N.-W.P., H.C.R., 343; Bhawani Prasad *v.* Damru (1882), 4 All., 197; Mamma Singh *v.* Ramadhin Singh (1881), 4 All., 252 and in Sabgram Singh *v.* Raghubar Dayal (1887), 15 Cal., 224. However, in Hajras *v.* Kanhya, 7 All., 118, it was held that it is not obligatory upon him to impeach the sale so far as the co-sharer-vendee is concerned for it may well be that he has no desire to exclude such co-sharer (*vide* also Sheobharos Rai *v.* Jiachi Rai (1886), 8 All., 462 and in Ram Nath *v.* Badri Narain (1896), 19 All., 148 (F.B.) and in Mushtaq Ahmad *v.* Amjad Ali, 19 All., 311, the Court held that where the share sold to the stranger was stated in the sale-deed then that share is alone to be pre-empted on proportionate payment of the price, but where the sale-deeed does not specify the share purchased by the stranger, then the co-sharer-vendee is to be treated in the same position as the stranger and the claim is to be decreed against him also. However under section 45 of the Transfer of Property Act co-vendees are presumed to be equally interested in the property sold, and hence it may be argued that the claim of the pre-emptor should be decreed to that extent only and not against the co-sharer-vendee.

[74] Wilson, p. 388; Tyabji, pp. 667 and 692.

This rule is based on the principle of equitable acquiescence, that is, a person (co-sharer-vendee) cannot claim the

However if the person joined as co-plaintiff is not a stranger and is one entitled to pre-empt the property and belongs to the same category then the suit is perfectly lawful.[75]

After the pre-emptor has obtained the decree[76] then the pre-emptor may sell the property to a third person who may deposit the purchase-money in Court. But such a transaction may give rise to a fresh cause of action to other pre-emptors.

---

pre-emptive right which he has himself violated, by associating himself with a stranger. Bhawani Prasad *v.* Damru, 5 All., 197; 2 A.W.N., 217; Rahima *v.* Razzaq Ali, 21 A.L.J.R., 184. In Ali Ahmad *v.* Rahmat Ullah, 14 All., 195, 12 A.W.N., 42, the pre-emptor had joined the mortgagee as co-plaintiffs in the suit for pre-emption the suit was dismissed *in toto* (*vide* also Rajoo *v.* Lalman, 5 All., 180). Is it possible for the pre-emptor to strike out the name of the stranger associated with him in filing the suit? It is submitted that his error could be rectified in the Court of the first instance, but not afterwards in the Appellate Court. Under O. 6, R. 17 of the Civil Procedure Code the Court has power to amend any pleading. The Allahabad High Court has however maintained the view that amendment of the plaint cannot be allowed. Bhupal Singh *v.* Mohan Singh, 19 All., 324; 17 A.W.N., 72. But *vide* Karan Singh *v.* Muhammad Hussain, 7 All., 860, which favours the correct view. The Punjab Chief Court allowed the names of strangers to be struck out. P.R., No. 83 (1898); P.R., No. 29 (1894); and also No. 102, P.R., No. 94 (1895); and P.R., No. 19 (1898).

The Punjab Chief Court has also held that if the pre-emptor has merely entered into agreement with a stranger as to what he will do with the property after decree simply in order to raise funds to meet the litigation expenses then he does not forfeit his claim to pre-emption. P.R. (1898), No. 19, P.R. (1896), No. 87, P.R. (1902), No. 10.

[75] Chotu *v.* Husain Baksh, 13 A.W.N., 25.

If two persons equally entitled to pre-empt file a suit and one of them withdraws then the other may lawfully pre-empt the whole property. Udey Ram *v.* Maula, 5 A.W.N., 189.

Where the vendee is a total stranger then the right against him is not lost owing to the fact that the pre-emptor has joined with him persons, who have different rights *inter se* Sheoraj Singh *v.* Naik Sahai, 41 All., 423; 17 A.L.J.R., 391.

[76] Ram Sahai v. Gaya, 7 All., 107, where a pre-emptor alienated his share pending an appeal, held it cannot affect

27. The right of pre-emption does not arise in favour of a person who has a mere expectancy of inheritance, or has any kind of contingent interest or any right falling short of complete ownership, however the property by reason of which the right accrues may not be in the possession of the pre-emptor nor is the right of pre-emption affected if this property was already mortgaged to a stranger.[77]

28. If the pre-emptor previous to the decree of the Court sells the property by means of which he derives his right of pre-emption, then his right is thereby invalidated.[78] That is, the pre-emptor must retain the pre-emptive cause at the time of the sale, and at the time of the institution of the suit and till the decree of the Court of first instance. If the pre-emptor has sold the property reserving for himself a condition of option then since his right in the property is not absolutely extinguished the right of pre-emption remains intact, during the time the option has not become absolute.[79]

his right. Sakina Bibi v. Amiran, 10 All., 472; 8 A.W.N., 177; Bibi *v.* Akbar Ali, 21 A.W.N., 183; where the pre-emptor sold his decreed share, to raise funds to pay the purchase money.

[77] Gokul Chand *v.* Ram Prasad, 9 A.W.N., 127; Ujgar Lal *v.* Jai Lal, 18 All., 382; 16 A.W.N., 112.

[78] Dayal, p. 396; Wilson, p. 388; Tyabji, p. 696; Abbasi, p. 108.

It is submitted that in British India the first Court is equivalent to the Kazi's Court, hence the first decree is important and therefore if subsequent to the decree the pre-emptor's right is extinguished, it does not affect the property pre-empted. The same view would apply if the pre-emptor's right is extinguished after the decree of the first Court but during the course of the appeal (*vide* Umrao *v.* Lachman, 22 A.L.J.R., 234). "In dealing with suits for pre-emption three dates have to be looked for, namely, the date of the sale sought to be pre-empted, the date of the suit, and the date of the first Court's decree."

[79] In Tafazul Husain *v.* Than Singh, 32 All., 567; 7 A.L.J.R., 715, after the pre-emptor had filed the suit the property was partitioned in consequence and the pre-emptor and the vendor became

If the pre-emptor has sold an undivided part of the property which gives him the right of pre-emption then also his right of pre-emption is not invalidated, and again if he sells a divided share but not the adjoining part next to the subject of pre-emption then also his right is not invalidated, but if he has sold the adjoining portion then his right is invalidated.

29. (i) If the vendee died, the property can be alienated or taken by the creditors of the vendee, but the right of pre-emption is not invalidated.

(ii) If after having sold a certain property the vendor died the right of pre-emption is not invalidated.

If the vendor was suffering from *Marz-ul-maut*, death-illness when he sold a certain property, and he had no other property, then his legal representatives according to some jurists cannot claim pre-emption with respect to the property sold, and according to others they can on paying the value of the property, but if the deceased left some other property also then there is a consensus of opinion that his legal representatives by reason of the inherited property have the right of pre-emption.[80]

(iii) If the pre-emptor died before he perfected his title, by obtaining possession of the subject-matter of pre-emption, or by judicial decree, then his right under the *Hanafi* Law is thereby extinguished,[81] but under the *Shafi'i* Law and the *Shi'a* Law[82] it passes to the pre-emptor's

owners of different mahals and thereby the pre-emptive right was extinguished before the decree, the suit therefore failed.

[80] According to Imam Abu Hanifa in all cases the legal representatives have no right to pre-empt the property sold.

[81] Sircar, T.L.L. (1873), p. 531; Wilson, p. 401; Abbasi, p. 108; Tyabji, p. 692; Kathalay, p. 124; Dayal, p. 396.

The Code Civil Ottoman, Art., 1038 adopts the *Hanafi* view.

[82] Baillie, Part II, p. 190; Querry, II, p. 285; Secs. 89, 90; Wilson, p. 464.

representatives. It appears that the *Hanafi* view has not been accepted by the Bombay High Court,[83] and the Allahabad High Court has applied it subject to certain restrictions.[84] It is submitted that under Anglo-Muhammadan Law the right to sue survives to the executor and administrator according to Sec. 306 of the Indian Succession Act XXXIX of 1925.[85]

30. (i) If the pre-emptor acts as the vendor's[86] agent and sells the property for him then he has no right of pre-emption in respect of the same property. But if he acts as the vendee's agent then he retains the right of pre-emption.[87]

If the pre-emptor acts as a *zamin*, surety, guaranteeing vendor's title then he forfeits his right to pre-empt the same property. If the pre-emptor becomes surety for the payment of sale-consideration by the vendee he forfeits his right of pre-emption.

Under the *Shi'a* Law the right is inheritable among all the heirs in proportion to their shares of inheritance, *e.g.*,—a *Shi'a* Muslim dies after filing the suit for pre-emption and leaves a widow and son. Then if both claim pre-emption the property will be divided in the ratio of 1/8 to 7/8.

[83] In Sayyad Jiaul Hussain, 36 Bombay, 144 (1911), the pre-emption was claimed under the Muslim Law and the Court held that section 89 of the Probate and Administration Act, 1881, has superseded the *Hanafi* Law *vide* also Sitaram, 41 Bombay, 636 (1917), P.C.

[84] Muhammad Husain *v.* Niamut-un-nissa, 20 All., 88 (1897).

[85] The Indian Succession Act XXXIX of 1925 has repealed the Probate and Administration Act V of 1881.

[86] It is obvious that the vendor cannot claim pre-emption in respect of the property sold by himself.

[87] Bohra Ganga Prasad *v.* Pooran (1928), 26 A.L.J.R., 89; Ganga Prasad was the *Mukhtar-'am* of the vendor and took part in the proceedings relating to the sale of the 1st of February, 1922, to the vendee. Subsequently he purchased a part of the property sold, from the vendee, on 7th of March, 1922. Held assuming that Ganga Prasad has disqualified himself from pre-empting the sale to the vendee, it does not follow that he has also disqualified himself from resisting a claim for pre-emption against him after he has purchased a part of the property.

(ii) If the vendor had contracted to sell subject to the option of a third person, and he confirmed the sale, then he is like the vendor and is not entitled to claim pre-emption, but if the vendee stipulated the option of a third party who confirmed the sale then his right of pre-emption on that account is not invalidated.

(iii) If the *Muzarib* partner sold a house from the partnership property and if the *Rub-ul-mal* partner is its pre-emptor then he cannot pre-empt that house. But if the *Muzarib* partner sold a house which does not belong to the partnership property then the *Rub-ul-mal* partner has the right to claim pre-emption.[88] If a *Muzarib* partner had purchased a house from the partnership's fund, and the *Rub-ul-mal* partner purchases another adjacent house for himself then the *Muzarib* partner is entitled to pre-empt that house.

(iv) If the *Mufawiz*[89] partner sells his own house then his co-partner is not entitled to pre-empt that house and if the *Mufawiz* partner surrenders the right of pre-emption then the surrender is deemed to be valid as against his co-partner.

31. If the pre-emptor possesses different rights of pre-emption, that is, supposing he is a partner and a neighbour, then the extinction of the right in the capacity of a partner does not extinguish the right of a neighbour.

32. The lawful guardian or the father of the minor or the guardian of a person of unsound mind may lawfully demand pre-emption on his behalf or he may relinquish the right. If he does not do so then the claim is barred abso-

[88] *Muzarib* means a partner who applies his personal labour and *Rub-ul-mal* means a partner who supplies his capital in the partnership.

[89] *Mufawiz* is a partner who has contributed an equal amount to the partnership fund and is held responsible for his co-partners' acts.

lutely and cannot be set up again by the minor on coming of age or by the insane person on recovering his reason.[90]

According to some jurists if the lawful guardian of the minor purchases some property on behalf of the minor, and happens to be the pre-emptor of the same property also, then his right of pre-emption becomes void, but according to few jurists he can exercise the right with the permission of the Court.

Under the *Hanafi* Law, if the father purchases a certain property for his minor son and happens to be the pre-emptor of that property also then he could pre-empt it for himself, but according to *Imam Zafr*, the father forfeits his right of pre-emption.

And similarly if the father purchases a certain property for himself, and his minor son happens to be the pre-emptor of that property then his minor son on attaining majority (puberty) cannot pre-empt the said property, but if a person sells his own property then his minor son pre-emptor, on attaining majority (puberty) may lawfully pre-empt the property sold.[91]

If a woman gives birth to a child within six months from the date of the sale transaction, then such a child may claim pre-emption by reason of the property he inherits on birth.

33. The vendee has the right to retain the property until he receives the purchase-money from the pre-emptor, and assuming that the vendor is in posses-

[90] Abbasi, p. 108; Tyabji, pp. 310 and 687; Dayal, p. 395.

Under the *Shi'a* Law the minor on coming of age, or lunatic on recovering his reason, may demand pre-emption of the property on his own account. And he may annul a pre-emptive purchase if he considers it to be disadvantageous. Some *Hanafi* authorities support this view also. This is the view of the Code Civil Ottoman, Art. 1035 also.

[91] It is difficult to think whether all this law would be applied in British India.

sion he may also retain the property until payment of the money by the pre-emptor.

34. (i) If the vendee has made improvements, altered or erected a building or planted trees on the land then the pre-emptor has the option to cause the building and trees to be removed or if the removal be found to be injurious then he may take the land with the said improvements on payment of the value of the materials[92] only.

(ii) If the vendee has improved the property by engraving, drawing, painting then the pre-emptor must pay for the improvements or forego his claim altogether.

(iii) If the vendee has cultivated the land then the pre-emptor must wait until the crops are ready, and thereupon the vendee must remove the crops, and the pre-emptor may then pre-empt the land at its value.

(iv) If the vendee or a stranger destroys the whole or any part of the building then the pre-emptor is entitled to take the property on a proportionate part of the original sale-consideration or he may forego his claim altogether. The vendee is entitled to keep the materials for they are not appendages of the site any longer.[93]

35. If the subject of pre-emption is completely destroyed by some supernatural calamity, *Afat Samaviyah*,

[92] Ameer Ali, Vol. I, p. 730; Tyabji, p. 721; Abbasi, p. 105.
According to the Code Civil Ottoman, Art. 1044, the vendee is entitled for compensation in lieu of improvements. The Egyptian Act of 1900, Art. 10 draws a fine distinction between improvements effected before and after the demand of pre-emption. In the former case the vendee is entitled to compensation, in the latter case the pre-emptor may ask the vendee to remove them, but if he elects to keep the improvements, then he should pay for them. Andre Marneur's La Chefa, p. 139. According to the Maliki Law it is essential that improvements should be made in good faith in order to entitle the vendee to receive compensation; compare also section 51 of the Transfer of Property Act IV of 1882. (Now amended by Act XX of 1929.)

[93] Ameer Ali, Vol. I, p. 732; Dayal, p. 391; Abbasi, p. 106.

vis major,[94] by fire, flood and tempest, then the pre-emptor is to pre-empt the property in its present condition on payment of the original sale-consideration or forego his claim altogether. However if a part of the property was destroyed and the vendee removed the materials then a portion of the sale-consideration will accordingly be reduced.

If a building be swept away by an inundation then the pre-emptor may take the land at its original price.

36. If the pre-emptor in possession of the pre-empted property makes any improvements or erects a building, and it afterwards appear that the vendor had no title to pass to the vendee and thereby to the pre-emptor himself, then the pre-emptor is entitled to recover the price paid from the vendor, and according to the *Shafi'i* Law from the vendee as it is paid to him always, but he cannot recover the expenses incurred in making improvements or erecting the building.[95]

According to the *Fatawa-i-Alamgiri* if the pre-emptor discovers a defect, but retains the property then he is entitled to recover compensation, for the loss sustained, from the vendee provided he had pre-empted the property by the order of the Court. The vendee will recover the amount from the vendor.

37. All transactions done by the vendee in possession affecting the property are voidable at the instance of the pre-emptor. The pre-emptor is to take the property as it stood at the date of sale.[96]

[94] Ameer Ali, Vol. I, p. 732; Dayal, p. 390; Abbasi, p. 106.

[95] Ameer Ali, Vol. I, p. 731; Dayal, p. 390.

[96] Ameer Ali, Vol. I, p. 732; Dayal, p. 390; Abbasi, p. 106.

In Kamta Prasad *v.* Mohan Bhagat, 6 A.L.J.R., 966; 32 All., 45, a vendee having purchased the property mortgaged a portion of it to the vendor. The pre-emptor pre-empted the property and paid the sale-consideration which was taken away

The right of pre-emption is not affected by the parties dissolving the sale after it was finally completed.[97]

38. The pre-emptor becomes the owner of the property when he takes possession of the subject-matter of pre-

---

by the vendee. In a suit for sale upon the mortgage—held that the vendee's right as a purchaser is subject to the pre-emptor's right of pre-emption and that the vendee cannot defeat the pre-emptive right by subsequently mortgaging the property so as to force him to take the property subject to the mortgage.

A pre-emptor made the demands of pre-emption. Subsequently the vendee transferred the property to a third person. Held that the subsequent sale must be deemed to have been effected subject to any right of pre-emption in force by the plaintiff. Muhammad Abdul Rahman *v.* Muhammad Ayyub Khan, 22 A.L.J.R., 817 (1924).

Where the vendee transferred the property to one of the two rival pre-emptors it was held that the doctrine of *lis pendens* was applicable and the other pre-emptor was entitled to pre-empt a one-half share of the property on payment of one-half of the consideration. Bhagwan Sahai *v.* Nanak Chand (1927), 25 A.L.J.R., 479. Where the purchaser acquired the status of a co-sharer *pendente lite*, held the plaintiff was not deprived of his right to pre-empt—Rohan Singh *v.* Bhan Lal, 31 All., 530. The right of pre-emption was not affected where the contract was dissolved. Bhodo Mohamed *v.* Radha Churn Bahi, 13 W.R., 332.

[97] Where after the institution of a pre-emption suit the vendee sold the property back to the vendor held that the pre-emptor was entitled to pre-empt the property. Tota Ram *v.* Gopal Singh, 16 A.L.J.R., 505, Kidar Nath *v.* Bankey Bihari, 11 I.C., 645; Imami *v.* Allah Diya, 40 I.C., 767. In Raj Narain *v.* Dunia Chand, 32 All., 340, it was suggested (p. 343) where there has been a re-sale by the original vendee the pre-emptor must claim to pre-empt both sales. However in Sheo Charan Singh *v.* Bhikai (1911), 14 O.C., 156, it has been held that a re-sale to the vendor before the institution of the suit defeats the right of the pre-emptor. But under the Muslim Law the demands having been made the right of pre-emption cannot be defeated, provided of course that the vendee had taken possession of the property under the original sale. And happily the same Court in Manna Singh *v.* Behari Singh (1916), 19 O.C., 183, overruled 15 O.C., 156, citing S.A., No. 191 of 1914 appended to the judgment. In S.A. No. 191 of 1914, pre-emption was claimed in respect not of the first but of the second sale this view is also in consonance with the Muslim Law. Manna Singh's case is an authority for the proposition that once a right of pre-emption has accrued it cannot be defeated by subsequent act of the vendee, except by the act of the pre-emptor or barred by the Law of Limitation.

emption either with the vendor's or vendee's consent or in pursuance of the decree on payment of the purchase-money. The vendee is in the meantime entitled to retain the income and fruits of the property. In case an appeal is filed by the pre-emptor then his title is perfected from the date of the decree of the highest Appellate Court.[98]

39. The right of pre-emption is defeated by various devices[99] the best device is by the vendor reserving to himself a narrow strip of the land or house adjoining to that of the *Shafi'-i-jar* in question. However even by this device the right of *Shafi'-i-sharik* or *khalit* is not defeated.

40. When the Court decrees a claim to pre-emption,[100] it shall fix a day on or before which the pre-emptor

---

[98] In Deokinandan, 12 All., 234 (1889), Mahmood, J. was of opinion that the vendee was entitled to the profits accruing up to the date when the pre-emptor acquired possession of the property in accordance with the terms of the decree. This view was approved by the Privy Council in Deonandan Prasad *v.* Ramdhari Chaudhri, 44 Ind. App. 80 (1916); 15 A.L.J.R., 375. In this case under a Subordinate Judge's decree the pre-emptors were in possession from 1900 to 1904. The High Court reversed the decree and the original vendee regained possession. The pre-emptors appealed to the Privy Council and succeeded. They recovered possession in 1909. Held that the original vendee was entitled to mesne profits between 1900 and 1904 and also between 1904 and 1909.

[99] Baillie Part I, pp. 511—514; Sircar, T.L.L. (1873), p. 540; Hamilton Hedaya, Vol. III, p. 604; Hedaya (Grady), p. 563; Wilson, 404; Ameer Ali, Vol. I, p. 736; Tyabji, p. 724; Agarwala, p. 146; Dayal, p. 398.

It appears that Imam Abu Yusuf favours various devices to defeat the pre-emptive claim, but Imam Muhammad does not approve of devices to avoid the right of pre-emption; Imam Shafi'i, Imam Malik and Hanbal are of the same opinion as Imam Muhammad.

[100] The Civil Procedure Code of 1908, First Schedule, Order XX, Rule 14.

(1) Where the Court decrees a claim to pre-emption in respect of a particular sale of property and the purchase-money has not been paid into Court the decree shall—

(*a*) specify a day on or before which the purchase-money shall be paid and,

shall pay the purchase-money, together with costs, if any, decreed against him. And the defendant shall deliver possession of the property to the pre-emptor, but that if the amount decreed is not paid, the suit shall be dismissed with costs.[101]

In case of rival claims to pre-emption, the Court shall direct equal distribution of property in favour of pre-emptors of equal degree, and if there are pre-emptors of the lower degree then the claim of inferior pre-emptors shall not take effect, until the pre-emptors of the higher degree have failed to comply with the terms of the judgment and decree.

(*b*) direct that on payment into Court of such purchase-money, together with costs (if any) decreed against the plaintiff, on or before the day referred to in clause (*a*) the defendant shall deliver possession of the property to the plaintiff whose title thereto shall be deemed to have accrued from the date of such payment but that if the purchase-money and the costs (if any) are not so paid the suit shall be dismissed with costs.

(2) Where the Court has adjudicated upon rival claims to pre-emption the decree shall direct—

(*a*) if and in so far as the claims decreed are equal in degree that the claim of each pre-emptor complying with the provisions of sub-rule (1) shall take effect in respect of a proportionate share of the property including any proportionate share in respect of which the claim of any pre-emptor failing to comply with the said provisions would, but for such default, have taken effect; and

(*b*) if and so far as the claims decreed are different in degree that the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to comply with the said provisions.

[101] Money paid by the pre-emptor is considered no longer to be his money and so it cannot be attached by his creditors. Abdus Salam, 19 All., 256 (1897). In Najib Khan *v.* Shiva Gopal, 11 A.L.J.R., 668, a creditor of the pre-emptor took away a part of the money deposited in court. However in this case the fact of removal made no difference; it did not prevent the pre-emptor from taking possession of the subject-matter of pre-emption.

The pre-emption decree in virtue of the terms imposed on the pre-emptor becomes a decree in favour of the defendant when the conditions imposed are not complied with, and it becomes final if the time allowed for preferring an appeal has expired.[102] The pre-emption decree is a purely personal one and cannot be transferred.[103]

A pre-emption decree required the pre-emptor to deposit the amount to the credit of the vendees within 30 days. The money was paid out of Court but the vendee certified in Court about payment. Held that this was sufficient compliance with the decree. Sukhpal Singh *v.* Abdur Rahman, 19 A.L.J.R., 493 (*vide* also Ram Lagan Pande *v.* Muhammad Ishaq Khan, 18 A.L.J.R., 162; 42 All., 181).

[102] Gopal Das *v.* Mamman Kunwar, 5 A.L.J.R., 136.

In Hirdey Narain *v.* Alam Singh, 16 A.L.J.R., 892; 41 All., 47, it was held that after the decree becomes final no time for payment could be extended by any Court.

[103] Tyabji, p. 718; Kathalay, p. 697.

The property pre-empted is however subject to the encumbrance to which it was subject when sold by the vendor. Tejpal *v.* Girdhari Lal, 30; All., 130 (1908).

However the pre-emptor is entitled to mortgage the property after the decree to pay the price. Bela Bibi *v.* Akbar Ali (1901), 24 All., 119. He can also sell the property permitting the vendee to pay the price into Court. Ram Sahai *v.* Gaya (1884), 7 All., 7 (*vide* also sec. 28).

Limitation for execution of the pre-emption decree—Art, 181 of the Limitation Act IX of 1908 applies. Chhedi *v.* Lalu, 24 All., 300.

فتاوی عالمگیری
کتاب الشفعة

وهو مشتمل علی سبعة عشر بابا

الباب الاول في تفسيرها و شرطها وصفتها وحكمها

FATĀWĀ-I-'ĀLAMGĪRĪ

KITĀB-AL-SHUF'A, COMPRISING XVII CHAPTERS

CHAPTER I

ON THE EXPLANATION, CONDITIONS, QUALITY AND EFFECT OF SHUF'A

١ - اما تفسيرها شرعافهو تملك البقعة المشتراة الثمن الذي قام علي المشتري هكذا في محيط السرخسي -

1. As regards the explanation of *Shuf'a*: In Law *Shuf'a* (pre-emption) signifies a right to take possession of a piece of land sold for the same price as has been paid by the purchaser. This is according to the *Muhit* of *Sarakhsī*.

٢ - و اما شرطها فانواع منها عقد المعاوضة و هوالبيع اوما هو بمعناه فلا تجب الشفعة بما ليس ببيع ولا بمعني البيع حتي لا تجب بالهبة و ا لصدقة والميراث والوصية لان الا اخذ بالشفعة تملك علي الماخوذ منه ما تملك هو فاذا انعدم معني المعاوضة فلو اخذ الشفيع اما ان ياخذ بالقيمة او مجانا

2. The conditions: (a) There must be a contract of exchange or a sale or what is equivalent to it, otherwise no right of pre-emption arises. So that the right of pre-emption does not arise out of a gift *hiba*: charity, *Ṣadaqa*: inheritance, and bequest *waṣiyyat*, because to pre-empt a property means acquisition of some property which was under the ownership of its previous owner, and the pre-emptor cannot acquire property in case of *hiba* without return, for even if he desires to take it by paying the price, then still he cannot do so, because its owner did not acquire the property by paying any value and likewise the

فالاسبيل الي الاول
لان الماخوذ منه لم
يتملك بالقيمة ولا
الي الثاني لان الجبر
علي التبرع ليس
بمشروع فامتنع
الاخذ اصلا وان كانت
الهبة بشرط العوض
فان تقابضا و جبت
الشفعة وان قبض
احد هما دون الآخر
فلا شفعة عند
اصحابنا الثلثة ولو
وهب عقارا من غير
شرط العوض ثم ان
الموهوب له عوضه
من ذالك دارا فلا
شفعة في الدارين
لا في دار الهبة ولا في
دار العوض و تجب
الشفعة في الدار التي
هي بدل الصلح سواء
كان الصلح عن الدار
عن اقرار او انكار او
سكوت و كذا تجب
في الدار المصالح
عنها عن اقرار واما
عن انكار فلا تجب
به الشفعة ولكن
الشفيع يقوم مقام
المدعي في اقامة
الحجة فان اقام
البنية ان الدار كانت
للمدعي او حلف

pre-emptor cannot take it free of price, because no force can be exercised in case of voluntary gratuitous transfers, *tabarru'*. Hence it is not lawful to take the property in contracts where there is no exchange. But if the gift be one with a condition of return, *Hiba-bi-Shartil-'iwaz*, and possession has been mutually interchanged then the right of pre-emption arises. But if possession has been taken so far by one of the parties only, then according to our three Imams, no right of pre-emption arises. And if a person donates some property without any condition of return and thereafter the donee gives some other property in exchange for it to the donor, in this case there is no right of pre-emption in either property (this is *Hiba-bil-'Iwaz*). But pre-emption arises as regards a property received by way of a composition for a claim, no matter whether the composition was after acknowledgment or denial of the claim, or silence was observed with regard to its admission or denial. In the same way the right of pre-emption arises as regards property compounded for, when the composition is after an acknowledgment of the claim but no right accrues

المدعا علية فنكل
فله الشفعة وكذلك
لا تجب في الدار
المصالح عنها عن
سكوت لان الحكم لا
يثبت بدون شرطه
فلا يثبت مع الشك في
وجود شرطه ولو كان
بدل الصلح منافع
فلا شفعة في الدار
المصالح عنها سواء
كان الصلح عن اقرار
او انكار ولو اصطلحا
علي ان ياخذ المدعي
الدار و يعطيه دارا
أخري فان كان
الصلح عن انكار
تجب في كل واحدة
من الدار بن الشفقه
بقيمة أخرى ان
كان عن اقراء لا يصح
الصلح و لا تجب
الشفعه في الدارين
جميعا لانهما ملك
المدعي و منها
معاوضة المال بالمال
و علي هذا يخرج
ما اذا صالح عن
جنايته توجب

when the composition takes place after denial of the claim, here the pre-emptor in establishing his claim acts in the position of the plaintiff, and if he brings witnesses to bear testimony, or if he demands an oath from the defendant who refuses to swear, then the right of pre-emption arises. Similarly in a case where a composition has taken place owing to the fact of silence with regard to the claim, no right of pre-emption arises, the *ḥukm* effect, of pre-emption does not take place where the cause *sharṭ* is absent; hence a doubt in the existence of cause nullifies pre-emption. And if the property in lieu of composition is profitable, then the property compounded for is not subject to pre-emption whether the composition is after an acknowledgment or denial of the claim. But if the plaintiff and the defendant have compounded and agreed that the plaintiff would take the disputed property and that he would give another property to the defendant in exchange for it, then if this composition has taken place after the denial of the claim, then pre-emption is due on each of the properties in lieu of the price of the other. And if the com-

القصاص فيما دون النفس علي دار لاتجب ولو صالح عن جناية توجب الارش دون القصاص علي دار يجب فيها حق الشفعة و كذا لو اعتق عبدا علي دار لا تجب الشفعة و ومنها ان يكون المبيع عقارا او هو بمعناه فان كان غير ذلك فلا شفعة فيه عند عامة العلماء سواء كان العقار مما يحتمل القسمة او لا يحتملها كالحمام و الرحي والبير والنهر والعين والدور الصغار ومنها زوال ملك البايع عن المبيع فاذا لم تزل فلا تجب الشفعة كما في البيع بشرط الخيار للبايع حتي لو اسقط خياره وجبت الشفعة ولو كان الخيار للمشتري و جبت الشفعة و لو كان

position was after an acknowledgment of the claim then the composition is not valid and no right of pre-emption arises in either of the two properties.

(b) There must be an exchange of property for property. The effect of this condition is that if a crime for which the punishment is *qiṣaṣ* retaliation is compounded for a property no pre-emption arises in such property, but if a composition is made by a property for a crime, punishable with fine, then such property is subject to pre-emption. Similarly if one should emancipate a slave in composition for some property, there is no right of pre-emption in such a case.

(c) The thing sold must be *'Aqār* or what is equivalent to *'Aqār* whether the *'Aqār* be divisible or indivisible, as a bath, a mill, a well, a canal, or a stream and small houses, but on other things besides these no right of pre-emption arises.

(d) There must be an entire cessation of the seller's right of ownership in the subject of sale, and when it does not cease, as for instance, when an option is stipulated by the seller, there is no pre-emption, but, when the option drops, the

right comes into existence. However, the right of pre-emption arises when the option is reserved by the vendee, and such is not the case when it is reserved by both vendor and the vendee. If the vendor should stipulate for the option to be exercised by the pre-emptor then the latter would have no right of pre-emption whether he confirms or dissolves the sale. The proper course for him in such a case would be neither to confirm nor dissolve the sale but allow it to become absolute by lapse of the time of option, for then the right of pre-emption would accrue in his favour. The options of defect and inspection do not prevent the right of pre-emption from coming into existence.

(e) There must be a total cessation of all rights and interest of the vendor. Therefore there is no right of pre-emption if the sale is invalid *fāsid*. But if the vendee who purchased by an invalid sale subsequently sells it by a valid sale, thereafter the pre-emptor appears, then he has the choice to take the property on the first or the second sale, and if he pre-empts the property on the second sale, it would be at the price fixed, but if he takes it on the first sale it would be

الخيار لهما لاتجب
الشفعة و لو شرط
البائع الخيار للشفيع
فلا شفعة له فان اجاز
الشفيع جاز البيع ولا
شفعة له وان فسخ
فلا شفعة له والحيلة
للشفيع في ذلك ان لا
يفسخ ولا يجيز حتى
يجيز البايع او يجوز
هو بمضي المدة فتكون
له الشفعة و خيار
العيب و الروية لا
يمنع وجوب الشفعة
و منها زوال حق
البايع فلا تجب
الشفعة في الشراء
فاسدا ولو باعها
المشتري شراء فاسداً
بيعاً صحيحاً فجاء
الشفيع فهو بالخيار
ان شاء اخذها بالبيع
الاول وان شاء اخذها
بالبيع الثاني ان
اخذها بالبيع الثاني
اخذ بالثمن وان
اخذ بالبيع الاول اخذ

the market value of the property when its possession was taken; for the property sold by an invalid sale after taking possession is like usurpation of it. This is according to the *'Aṣl*. According to 'Imâm Abu Ḥanīfa if a person buys a land under an invalid sale, thereafter builds on it, then the right of pre-emption accrues, whereas, the two disciples hold that no such right arises.

(f) At the time of the sale there must be *milk* ownership of the pre-emptor in some property by reason of which he claims the right of pre-emption, the pre-emptor has no right by reason of a mansion of which he is merely an occupier whether a tenant on hire or on *'ariat* nor will he have the right or pre-emption if he had sold this property before this transaction, nor if he has converted it into a *masjid*.

(g) The *milk* ownership of the pre-emptor must be established, at the time of the denial of his claim, by means of absolute evidence. This tantamounts to the establishment of the right. If the vendee denies the ownership of the house by reason of which the claim is founded, the pre-emptor cannot pre-empt until he has proved his title. This

بقيمة المبيع يوم
القبض لان المبيع
بيعاً فاسداً مضمون
بالقبض كالمغصوب و
على هذا الاصل
يخرج قول ابي
حنيفة فمين اشترى
ارضا شرا* فاسداً
فبنى عليها انه يثبت
للشفيع حق الشفعة
و عندهما لا يثبت
ومنها ملك الشفيع
وقت الشراء في الدار
الذي يا خذ بها
الشفعة فلا شفعة له
بدار يسكنها
بالاجارة والاعارة ولا
بدار با عها قبل
الشراء ولا بدار
جعلها مسجدا و
منها ظهور ملك
الشفيع عند الانكار
بحجة مطلقة وهو
البنية او تصديقه و
هو في الحقيقة
شرط ظهور الحق
لاشرط ثبوته فاذا
انكر المشتري كون
الدار التي يشفع
بها مملوكة للشفيع

is according to the views of 'Imâm Abu Ḥanīfa and Imâm Muḥammad and one of the two reports of Abu Yusuf also mentions the same view.

(h) The subject of pre-emption should not be the property of the pre-emptor, at the time of sale, if it is so there is no pre-emption at all.

(i) It is necessary that there should be no acquiescence by the pre-emptor, in the sale or its effect, either expressly or impliedly. If he acquiesces in the sale or its effect, say by his having been employed by the vendor to negotiate the the sale, and he acts accordingly then he has no right of pre-emption. Similarly when a *Muzārib*[1] partner sell a house from the partnership property, and if *Rabbul-māl*[2] partner is its pre-emptor by reason of his adjacent house, then he has no right of pre-emption whether there is profit in the partnership or not.

(j) 'Islâm, on the part of the pre-emptor, is not a condition for the establishment of the right of pre-emp-

ليس له ان ياخذ
بالشفعة حتى يقيم
البنية انها داره
وهذا قول ابي حنيفة
و محمد واحدي
الروايتين عن ابي
يوسف ومنها ان لا
تكون الدار المشفوعة
ملكا للشفيع وقت
البيع فان كانت لم
تجب الشفعة ومنها
عدم الرضي من
الشفيع بالبيع او
بحكمه صريحا او
دلالة فان رضي
بالبيع او بحكمه
صريحا او دلالة بان
وكله صاحب الدار
ببيعها فباعها
فلا شفعة له وكذلك
المضارب اذا باع
دارا من مال
المضاربة ورب المال
شفيعها بدار اخرى
له لا شفعة لرب
الدار سواء كان في

---

[1] Muzârib means a partner who applies his person's labour.

[2] Rabbul-mâl means a partner who supplies his capital in the partnership.

الدار ربع اولم
يكن فيها ربع
واسلام الشفيع ليس
بشرط لو جوب
الشفعة فتجب لاهل
الذمة فيما بينهم
والذمي علي المسلم
وكذا الحرية والذ
كورة والعقل والبلوغ
والعدالة ليس بشرط
فتجب الشفعة
للماذون والمكاتب
ومعتق البعض
والنسوان والصبيان
والمجا نين واهل
البغي الاان الخصم فيما
يجب للصبي او عليه
وليه الذي يتصرف
في ماله من الاب
وو صيه والجداب
الاب ووصيه والقاضي
ووصي القاضي هكذا
في البدايع واما
صفتها فالاخذ
بالشفعة بمنزلة شراء
مبتداء فكل ماثبت
للمشتري من غير
شرط نحو الرد
بخيار الرؤية يثبت
للشفيع ومالا يثبت

tion, so that *Zimmīs*, non-Muslims, are entitled to exercise the right between themselves and as against Muslims; similarly free birth manhood, wisdom, puberty or justice, are not requisites of the right of *Shuf'a* for slaves *māzūns*, *mukātibs*, half-freed women, minors, insane persons and *Ahl-baghy* dissenters all are equally entitled. In case of minors when the right accrues in their favour or against them, the suit would be filed by or against their lawful guardian who administers the estate, having been appointed by the father as his executor or by the great grandfather as his executor, or by the Kazi or his successor as administrator. This is according to the *Badāyi'*.

(k) The effect of is that acquisition by pre-emption is considered as a purchase *ab initio* so that all that is implied in favour of the vendee without stipulation, as for instance, the right of returning the property under the option in inspection, is equally established in favour of the pre-emptor, and whatever is not deemed to be in favour of the vendee without his stipulating for is likewise not established for the pre-emptor. This is according to the *Khizānat-ul-muftīn.*

للمشتري الا بالشرط
لايثبت للشفيع الا
بالشرط هكذا في
خزانة المفتين وما
حكمهافجواز طلب
الشفعة عند تحقق
سببها وتاكدهابعد
الطلب وثبوت الملك
بالقضاء ها وبالرضاء
هكذا في النهاية -

. (1) The effect of *Shuf'a* is to legalise the demand of pre-emption on the ascertainment of the cause and to confirm it after demand and to establish the right of property in virtue of the decree of the Kazi or by the consent of the vendee. This is according to the *Nihāya*.

٣ - قال اصحابنا
الشفعة لا تجب في
المنقولات مقصودا
وانما تجب تبعا
للعقار وانما تجب
مقصودافي العقارات
كالدار والكرم وغيرها
من الا راضي
وتجب في الا راضي
التي يملك رقا بها
حتى ان الا راضي
التي حازها الا مام
لبيت المال ويدفع
الي الناس مزارعة
فصار لهم فيها
كردار كالبناء
والاشجار والكبس اذا
كسبو ها بتراب
نقلوها من موضع
يملكونها فلو بيعت
هذه الاراضي
فبيعها باطل وبيع
الكردار ان كان
معلوما يجوز ولكن

3. The jurists hold that moveables are not fit objects of pre-emption by themselves, but they become fit objects as accessories to the *'Aqār*; and that such objects as mansion, vineyards, and other kinds of land are fit objects of pre-emption absolutely. The right of pre-emption arises on lands which are objects of property, so that when the Imam takes possession of lands for the *Bait-ul-mal*, or public treasury, and has given them up for *muzāra'at*, cultivation, to people who have built upon them, or have planted trees, or have filled them up with *turāb*, mud and sand, brought from their own lands, and afterwards sold the buildings or trees; the sale of the lands being unlawful, and the sale of the buildings being permissible, therefore there is no right of pre-emption in the buildings and trees. And similarly

لاشفعة فيها وكذا
الاراضي الميانديهية
اذا كانت الاكرة
يزرعونها فبيعها
لا يجوز في ادب
القاضي للخصاف
في باب الشفعة
وانما تجب بحق
الملك حتي لوبيعت
دار بجنب دار الوقف
فلا شفعة للواقف ولا
ياخذها المتولي وفي
فتاوي الفقيه ابي
الليث وكذلك اذا
كانت هذه الدار وقفا
علي رجل لا يكون
للموقوف عليه الشفعة
بسبب هذه الدار كذا
في المحيط - رجل له
دار في ارض وقف فلا
شفعة له ولو باع هو
عمارة فلا شفعة
لجاره ايضا كذا
في السراجية و
في التجريد مالا
يجوز بيعه من
العقار كالاوقاف
لا شفعة في شئي
من ذلك عند من
يري جواز البيع
في الوقف كذا في
الخلاصة ولو اشتري
دارا ولم يقبضها حتي
بيعت بجنبها دار

the sale of lands *miyān-dīhiyat* which are ploughed and cultivated by farmers is not lawful. And it is according to chapters of *'Adab-ul-qāzī* of Imâm Khisâf's Book of pre-emption that right of pre-emption accrues by reason of *milk* ownership only; hence if a mansion was sold by the side of a *waqf* property the *wāqif* would have no right; nor could the *mutawallī* pre-empt the sale. This is according to the *Fatāwā-i-Kāfiyah* of Abu'l-Lais. And according to the *Muḥīṭ* if a mansion was made *waqf* for the benefit of a private individual then also he has no right of pre-emption by reason of the *waqf* property. Hence if a person owns a house on the *waqf* land, the effect is that he has no right of pre-emption. And if he sells the house, then his neighbour also has no right of pre-emption. This is according to the *Sirājiyya*. According to the *Tajrīd* those *'aqār* ***waqf*** endowments whose sale is unlawful, are not subject to pre-emption even according to those who hold their sale lawful. This is according to the ***Khulāṣa***. If a person purchases a house, but has not taken possession of it meanwhile another adjacent house is sold, then he

اخري فله الشفعة كذا
في محيط السرخسي -
۴ - ولا تجب الشفعة
في دار جعلت مهرا
مراة او عوض عتق
هكذا في التبيين -
ولو تزوجها بغير
مهر مسمي ثم باعها
داره بمهر المثل
تجب الشفعة ولو تز
وجها علي الدار
اوعلي مهرمسمى ثم
قبضت الدار مهرا
فلا شفعة هكذا
في خزانة المفتين -
ولو تزوجها علي
مهر مسمى ثم
باعها بذلك المهر
دارا تجب للشفيع
فيها الشفعة وكذلك
اذا تزوجها علي غير
مهر و فرض لها
القاضي مهرا ثم باعها
دارا بذلك المفروض
تجب للشفيع فيها
الشفعة هكذا في
المحيط - ولو تزوج
امراة علي دار علي

has the right of pre-emption. This is according to the *Muḥît* of *Sarakhsī*.

4. There is no right of pre-emption in a house assigned to a woman as her dower or in a house given in lieu for the emancipation of a slave. This is according to the *Tabyīn*. If a man marries a woman without specifying any dower, and then gives to her a mansion in exchange for her ***mahrul-misl***, dower of her equals, then the mansion is liable to pre-emption. But if he were to marry her and specify a mansion as her dower, or if the mansion is taken possession of in relinquishment of her right to dower, the mansion is not liable to pre-emption.[1] This is according to the *Khizānatul-muftīn*. If a man marries a woman for a specified dower, and thereafter gives her a mansion in lieu of the dower then the right of pre-emption arises in the mansion. So also if he marries her without any specification of dower, and some dower is subsequently fixed by the Kazi, and a mansion is given to her in lieu of her dower, the right of pre-emption arises in the mansion. This is according to the *Muḥīṭ*. If a person

[1] This is the case of *Hiba-bil-'iwaz* and therefore there is no pre-emption.

ان ترد المراة عليه
القا فلا شفعة في
شئي من الدار
عند ابي حنيفه
وعند هما تجب
الشفعة حصه الالف
وكذلك لو خالع
المراة ن يرد الزوج
عليها الفا فعلي
هذا الخلاف كذا
في محيط السرخسي-

marries a woman for a house (as her dower) on the condition that the woman would pay him 1000 *dirhams* then according to Imām Abu Ḥanifa, there is no pre-emption in any part of the house ; but according to his two disciples that much part of the house which is equivalent to 1000 *dirhams* is liable to pre-emption. Similarly in the case *Khula*, if a woman makes *Khula'* divorce with her husband on the condition that the husband takes the house and returns 1000 *dirhams* to her, there is a difference of opinion. This is according to in the *Muhit* of *Sarakhsi*.

٥ -واذا صالح من
دم عمد علي
دار علي ان يرد
عليه صاحب الدار
الف درهم فلا شفعة
في الدار في قول
ابي حنيفه وعند
ابي يوسف و محمد
يا خذ منها جزا
من احد عشر جزء
بالف درهم وكذلك
الصلح من شجاج
العمد التي فيها
القود وان صالحه
من موضحتين احد

5. If after having committed a deliberate murder, the murderer compounds it for a house on the condition that the representatives of the murdered person should return to him 1000 *dirhams* then according to Imām Abu Ḥanifa no right of pre-emption arises in such a house ; but according to his two disciples pre-emption is due in one-eleventh part of the house fow payment of 1000. Similarly in the case of the composition of wound "*Shajāj-ul-'Amad*" which is subject to *qiṣāṣ*, there is the same difference of opinion. But if the composition is made on a house in lieu of

هما عمد والاخرى خطاء علي دار فلا شفعة فيها في قول ابي حنيفة رح وفي قول ابي يوسف و محمد رح ياخذ الشفيع نصفها بخمسمائة لان موجب موضحة الخطاء خمسمائة درهم كذا في المبسوط -

two wounds known as *Mūziḥatul-'Amad* and the other *Mūziḥatul Khaṭā*,[1] then according to Imâm Abu Ḥanifa, there is no pre-emption, but the two disciples are of opinion that the pre-emptor can take half of 500 *dirhams* because the fine for *Muzihatul Khaṭā* is 500 *dirhams*. This is according to the *Mabsūṭ*.

٦ - اذا تزوج امراة بغير مهر و فرض لها داره مهرا اوقال صالحتك علي ان اجعلها لك مهرا اوقال اعطيتك هذه الدار مهرا فلاشفعة للشفيع في هذه الفصول كذا في الظهيرة - رجل تزوج امراة ولم يسم لها مهرا ثم رفع اليها دار فهذا على وجهين ان قال الزوج جعلتها مهرك فلا شفعة فيها وان قال جعلتهابمهرك ففيها الشفعة كذا في الذخيرة -

6. A man marries a woman without mentioning any dower, and then gives her a mansion. If in so doing, he says, 'I have given it as your dower, or have assigned the mansion to you as your dower, there is no pre-emption. This is according to the *Zakhīra*. A man marries a woman without specifying any dower, and then gives her a mansion. This case has two aspects:—(a) If he, in so doing, says 'I give it to you as your dower,' there is no pre-emption, (b) but if he says 'I give it to you in exchange of your dower,' the mansion is liable to pre-emption. This is according to the *Zakhīra*.

٧ - واذازوج الرجل ابنته وهي صغيرة علي دار فطلبها

7. If a person marries his infant daughter for a house as her dower and the pre-emptor demands it in pre-emp-

[1] A grievous wound inflicted on the head for which punishment is retaliation *qiṣāṣ*.

الشفيع في الشفعة
فسلمها الاب له بثمن
مسمى معلوم بمهر
مثلها اوبقيمة الدار
فهذا بيع وللشفيع
فيها الشفعة وكذلك
لوكانت الا بنة كبيرة
فسلمت فهو بيع
و للشفيع فيها
الشفعة و ان صالح
من كفالة بنفس
رجل علي دار فلا
شفعة فيها سواء
كانت الكفالة بنفس
رجل في قصاص
اوحدّ اومال ففي
حكم الشفعة وبطلان
الصلح في الكل
سواء ولو صالح
من المال الذي
يطلب به فان قال
علي ان يبراء فلان
من المال كله فهو
جائز وللشفيع فيها
الشفعة لان صلح
الاجنبي عن الدين
علي ملكه صحيح
كصلح المديون
وان قال اقبضتكها
عنه فالصلح باطل
هكذا في المبسوط -
٨ - ومن لايجو
زهبة بغير عوض
كالاب في مال ابنه

tion, and the father delivers it to him for some price specified as the dower of her equals, or for the value of the house, then such transaction is a sale, and another pre-emptor, if any, is entitled to demand pre-emption. And similarly if the daughter is a major and she delivered the house, then also it is a sale and the house is liable to pre-emption. If composition is made in lieu of some person acting as a surety *zāmin* for a house, then there is no pre-emption whether personal guarantee *kafālat bin-nafs* was in *qiṣaṣ*, *ḥadd*, or *māl* property. As regards these the effect of pre-emption and the invalidation of composition are the same. If a stranger makes a composition in lieu of the creditor releasing the debtor from the whole debt, it is valid, and the pre-emptor is entitled because the composition for the debt of another person by means of his property is as valid as the composition of the debtor himself. But if the stranger says that he delivers the property to him on behalf of the debtor, then the composition is void. This is according to the *Mabsūṭ*.

8. Among those gifts which cannot be made without exchange, and which as such are invalid, are a gift by father

وكالمكاتب و العبد
التاجر اذا وهب
بعوض لايصح ولا
تجب الشفعة عند
ابي يوسف رح و عند
محمد رح يصح وتجب
الشفعة كذا في محيط
السرخسي-وان وهب
لرجل دارا علي ان
يهبه الآخر الف درهم
شرطا فلا شفعة
للشفيع فيه مالم
يتقابضا ان قال
قد اوصيت بداري
بيعا لفلان بالف
درهم و مات الموصي
فقال الموصي له
قبلت فللشفيع
الشفعة وان قال له
اوصيت له بان
يوهب له علي عوض
الف درهم فهذا
و مالو باشر الهبة
بنفسه سواء في
الحكم وان وهب
نصيبا من دار
مسمي بشرط العوض
وتقابضا لم يجز ولم
تكن فيه الشفعة
عندنا وكذلك ان

of the property of his minor son, or a gift by a slave *mukātib*, or a slave *māzūn*. According to Imām Abu Yusuf these gifts are not valid and not liable to pre-emption, whereas according to Imam Muḥammad they are liable to pre-emption for the gifts are valid. This is according to the *Muḥīt* of *Sarakhsī*. If a mansion is gifted away to a person on the condition that the donee should make a gift of 1000 *dirhams* to the donor, then the pre-emptor has no right of pre-emption until the parties have interchanged their gifts. If a person made a *waṣiyyat*, will to the effect that his house should be sold to a particular person for 1000 *dirhams* thereafter the testator dies, and the will was acted upon, then the pre-emptor is entitled to pre-emption. If he says to the executor 'I have made a will to hand over the house as a gift in exchange for 1000 *dirhams*, then in this case, and in the above the law is the same. And if a portion of the mansion mentioned above was gifted away on the condition of exchange and the parties took possession, then such a transaction is invalid, and is not liable to pre-emption and similar is the case of the property which is divisible but which is considered as

كان الشيوع في
العوض فيما يقسم
وان وهب دار الرجل
علي ان ابراۂ من
دين له عليه ولم
يسمه وقبض كان
للشفيع فيها الشفعة
وكذلك لو وهبها
بشرط الابراء مما يد
عي في هذه الدار
الاخرى وقبضها فهو
مثل ذلك في
الاستحقاق بالشفعة
هكذا في المبسوط -
٩ - رجل اشترى
جارية بالف فصالح
من عيب بها على
حجود منه او اقرار
بالعيب على دار
فللشفيع الشفعة
كذا في الجامع
الكبير في باب الشفعة
في الصلح ولو صالحه
عن عيب على الدار
بعد القبض فالقول
للمصالح في نقصان
العيب كذا في
التاتارخانية - واذا
كان الرجل على رجل
دين يقرّبه او يجحده
فصالحه من ذلك

indivisible. If a mansion is gifted away to a person on the condition that the donee should release the donor from his debt and the debt is not specified, then the right of pre-emption arises in the mansion. And similarly if a mansion is gifted away on the condition that the donee should release the donor from all claims which he has against the mansion and the donee takes possession, then this is similar to the above as regards pre-emption. This is according to the *Mabsūṭ.*

9. If a person buys a female slave for 1000 *dirhams* and then compromises for her defect, whether acknowledged or denied by the seller, on a house, then pre-emption arises in the house. This is according to the *Jāmi'-al-Kabīr*, chapter of pre-emption on composition. If the composition from defect were made after the possession had been taken then as regards the loss from defect, the statement of the person who made the composition would be accepted. This is according to the *Tātār Khāniyya.* If a person owes a debit to another person, and whether he acknowledges it or denies it, the creditor compromises for that debt in lieu of a house of the debtor, or buys it from him

علي دارا واشتري به منه دار اوقبضها فللشفيع فيها الشفعة فان اختلف هو والشفيع في مبلغ ذلك الدين وجنسه فهو بمنزلة اختلاف المشتري والشفيع في الثمن ولايلتفت الي قول الذي كان عليه الحق كذا في المبسوط –

١٠ – دار بين ثلثة نفر مثلا جاء رجل وادّعي لنفسه فيها دعوي فصالحه احد شركاء الدار علي مال علي ان يكون نصيب المدعي لهذا المصالح خاصة فطلب الشريكان الآخران الشفعة فان كان الصلح عن اقرار شركاء الدار بان اقر شركاء الدار بما ادعاه المدعي وصالح مع المدعي واحد منهم علي ان يكون نصيب

in satisfaction of his debt, and intends to take possession of it, then the pre-emptor is entitled to pre-empt it. But if the pre-emptor and the creditor differ as regards the total debt or its items, then this difference is treated in the same way as regards difference of price between a purchaser and a pre-emptor and as such the statement of the creditor should not be considered as final. This is according to the *Mabsūṭ*.

10. A mansion is shared between three individuals. Thereafter another person appears, and claims a share in it. Then one of the sharers of the mansion compromises with him for a certain property on the condition that the share claimed would now become his property. Later on the two sharers demand pre-emption in that share. In this case, if the composition was, after the acknowledgment by all sharers, of the claim of the claimant, thereafter this sharer had made the composition with the claimant on the condition that the share claimed should become his property, then the two sharers are entitled to demand pre-emption; but if the composition was after denial by sharers of the claimant's claim, then they are not entitled to demand

المدعي له خاصة كان لهم الشفعة في ذلك وان كان الصلح عن انكار الشركاء فلا شفعة وان كان المصالح مقرا بحق المدعي وانكر الشريكان الاخران حقه فالقاضي يسال الشريك المصالح البينة علي ما ادعاه المدعي واذا اقام البينة علي ما ادعاه المدعي قبلت بينة لانه مشترا ثبت ملك بائعه فيما اشتري حتي يثبت شراؤه واذا قبلت بينة صار الثابت بالبينة كالثابت باقرار الشركاء وهنا للشريكين الاخرين حق الشفعة فهنا كذلك واذا ادعي حقا في دار وصالحه المدعي عليه علي سكني دار اخري فلا شفعة للشفيع في الدار التي وقع الصلح عنها كذا في المحيط - ولو كان ادعي دينا او وديعة او جراحة خطاء

pre-emption. If this sharer-compromiser had acknowledged the right of the claimant and the two sharers had denied his claim, then the *Kāzī* shall call upon the sharer-compromiser to produce evidence to prove the claimant's claim, and if he does so, his evidence should be accepted, for he, in the capacity of the vendee, proves the title of his vendor in the sale to himself, and on the evidence being tendered the fact is established as effectually as it would have been if acknowledged by the sharer, and as they would have had a right of pre-emption in that case, similarly here they are equally entitled to it. When a person claims a right in the mansion, and then defendant compromises with him for a *suknā*[1] residence in another house, then the pre-emptor has no right to demand pre-emption in the mansion compounded for. This is according to the *Muḥīṭ*. If a plaintiff makes a claim for a debt, or for some property or for an unlawful wound and the defendant compromises with him in lieu of residence of a house, or for a house to be bequeathed to

[1] Simply the right to live in the house.

فصالحه علي دار
اوحائط من دار
فللشفيع فيه الشفعة
واذا صالح من
سكني دار اوصي له
بهااوخدمةعبدعلي
بيت فلا شفعة فيه
واذا ادعي علي رجل
مالا فصالحه علي
ان يضع جذوعه
علي حائط اويكون
له موضعها ابدا
اوسنين معلومة
ففي القياس هذا
جائز لان ماوقع عليه
الصلح معلوم عينا
كان اومنفعة ولكن
ترك هذا القياس
فقال الصلح باطل
ولاشفعة للشفيع فيها
وكذلك لو صالحه
ان يصرف مسيل مائه
الي دار لم يكن لجا
الدار ان ياخذ
مسيل مايه بالشفعة
ولو صالحه علي
طريق محدود معروف
في دار كان للجار
الملاصق ان ياخذ
ذلك بالشفعة وليس
طريق فيها كمسيل
الماء لان عين
الطريق تملك فيكون

him or for the service of a slave in lieu of a house, then the house is not liable to pre-emption. But if the plaintiff claims a property against a defendant, and then the defendant compromises with him on the condition that he (other party) would allow him to insert his beams on his walls, or appropriate a place for them for ever or for a specified number of years, then according to the doctrine of *qiyās* it is valid, for the thing over which the composition is made is definite and known. It is a servitude, a gain. But the great Imâm does not approve of applying *qiyās* hence. the composition becomes invalid, and the pre-emptor is deprived of his right of pre-emption. And similarly if the composition is made on the fact that the plaintiff may turn his water-course towards the defendant's house, then the neighbour of the house is not entitled to demand the water-course in pre-emption. If the composition is made with reference to a defined and specified passage in the house, then it is open to the ***jār-i-mulāṣiq*** to demand pre-emption in the passage. The passage in the house is not the same as the water-course, for the passage itself

شريكا بالطريق ولا
يكون شريكا بوضع
الجذع في الحائط
والهراوي و ومسيل
الماء كذا في
المبسوط -
١١ -وفي المنتقى
عن محمد رح في الا
ملاء رجل اشتري
دارا واشترط الخيار
للشفيع ثلثا قال ان
قال الشفيع امضيت
البيع علي ان
آخذ بالشفعة فهو
علي شفعة وان لم
يذكر اخذ الشفعة
فلا شفعة له كذا في
التاتار خانية ولو باع
دارة علي ان يضمن له
الشفيع الثمن علي
المشتري والشفيع
حاضر فضمن جاز
البيع ولا شفعة له
لان البيع من جهة
الشفيع قد تم فلا
شفعة له وكذلك
لو اشتري والمشتري
الدار علي ان

gives rise to the right of pre-emption, and the pre-emptor is a partner in the way. This is not the case in inserting of beams in the wall, or in the water-course. This is according to the *Mabsūt*.

11. It is reported from Imām Muhammad in the *Muntaqā* that if a person buys a mansion, and stipulates an option of three days for the pre-emptor, and the pre-emptor says "I allow the sale, with the proviso that I demand pre-emption in it," his right remains intact, but if he does not demand pre-emption, his right would be extinguished. This is according to the *Tātār Khaniyya*. If a person should sell a mansion on the condition that the pre-emptor should become a surety for the payment of the price by the vendee, and the pre-emptor is present and takes this responsibility upon himself then the sale is valid, and the pre-emptor forfeits his right of pre-emption inasmuch as the sale was completed because of him. And similarly if the vendee purchases a mansion on the condition that the pre-emptor should become surety for *zāmān dark*[1] on behalf of the vendor and the pre-emptor was

[1] It appears that this means the property will be delivered in good condition as contemplated.

يضمن له الشفيع
الدرك عن البايع
والشفيع حاضرفضمن
جاز البيع ولاشفعة
له كذا في شرح
الطحاوي ولو كان
المشتري بالخيار
ابدالم يكن للشفيع
فيها الشفعة فان
ابطل المشتري
خياره واستوجب
البيع قبل مضي
الايام الثلثة وجب
الشفعة وكذلك عند
هما بعد مضي الايام
الثلثة كذا في
المبسوط-وان كان
المشتري شرطالخيار
لنفسه شهرا او ما
اشبه ذلك فلا شفعة
للشفيع عند ابي
حنيفة ح فان ابطل
المشتري خياره قبل
مضي ثلثه ايام
حتي انقلب البيع
صحيحا وجبت
للشفيع الشفعة
كذا في المحيط
و في الفتا وي
العتا بية ولو باعه
بخيار ثلثة ايام
ثم زاده ثلثه اخري
وقد كان الشفيع
طلب الشفعة وقت
البيع اخذها اذا
انقضت المدة الاولي

present and became a surety, then he forfeits his right of pre-emption. This is according to the *Sharh-ut-Tahāwī*. If the vendee has stipulated a perpetual option, then the pre-emptor has no right to pre-empt. But if the vendee invalidates the option, and completes the sale within three days, then the right of pre-emption arises and the pre-emptor is entitled to demand pre-emption. The two disciples are also of the same opinion. This is according to the *Mabsūt*. If the vendee stipulates an option of a month or so for himself, then according to Imâm Abu Hanifa the pre-emptor is entitled to pre-emption. But if he invalidates the option within three days since the sale, then the right of pre-emption arises. This is according to the *Muhīt*. It is mentioned in the *Fatāwā-i-'Attābiyya* that if the vendor sells some property stipulating an option of three days, and then extends the option to three days more, and the pre-emptor demands pre-emption at the time of sale, then he would be entitled to claim the property at the end of the period of the first option; and if of the two neighbours one does not assert his right, the other pre-emptor

و اذا ردها احد
الجار من علي الاصل
اخذها الجار الاخر
كذا في التاتار خانية-

١٢ - واذا اشتري
دارا بعبد بعينه
اوبعد وبعينه وشرط
فيه الخيار لاحد
هما ان شرط الخيار
لبائع الدار فلا
شفعة للشفيع قبل
تمام البيع سواء
شرط الخيار في
الدار وفي العبد
كذا في المحيط -
واذا اشتري دار
العبد و اشترط
الخيار ثلثا المشتري
الدار فللشفيع فيه
الشفعة فان اخذها
من يد مشتريها
فقد وجب البيع
له فان سلم المشتري
البيع وابطل خياره
سلم العبد للبايع
فان ابي ان يسلم
البيع اخذ عبده
ودفع قيمة العبد
التي اخذها من
الشفيع الي البايع

may pre-empt it. This is according to the *Tātār Khāniyya*.

12. If a mansion is purchased in exchange for a definite slave or a definite sum of money under a stipulation of option for any one of them, then if the option was reserved by the vendor, the right of pre-emption does not arise before the completion of sale, it is immaterial whether the option was with respect to the mansion or the slave. This is according to the *Muhīt*. If a mansion is exchanged in lieu of a slave, and an option of three days is given to the vendee of the mansion, then the pre-emptor is entitled to demand pre-emption. If the pre-emptor pre-empts the mansion from the vendee, the sale becomes obligatory, consequently if the vendee confirms the sale exercising his option, then the slave will be delivered to the vendor of the mansion, but if he declines to confirm the sale, he retains his slave, and will give the price of the slave which he received from the pre-emptor to the vendor. In this case, the pre-emption of the mansion would not be as the result of the exercise of the option by the vendee, nor would

ولا يكون اخذ الشفيع الدار بالشفعة اختيار من المشتري و اسقاط لخيارة في العبد بخلاف ما اذا باعها المشتري فذلك اختيار منه ولو كانت الدار في يد البايع كان للشفيع ان ياخذها منه بقيمة العبد ويسلم العبد للمشتري ولو كانت الدار في يد المشتري فهلك العبد في يد البائع انتقض البيع ورد المشتري الدار وللشفيع ان ياخذها بقيمة العوض كذا في المبسوط - ولو كان الخيار لبايع الدار بيبعت الدار بجنب الدار المبيقه فللبايع فيها حق الشفعة فان اخذها كان هذا منه نقضا للبيع كذا في المحيط - واذا كان الخيار للمشتري فبعيت دار بجنب هذه الدار كان له فيها الشفعة فاذا اخذها بالشفعة كان هذا منه اجازة البيع فاذا جاء الشفيع واخذ منه

it be the result of the dropping of the option in respect of the slave, and if the vendee himself had sold the mansion then he would have been considered to have exercised the option. However, if the mansion was in the possession of the vendor, the pre-emptor is entitled to take it from him on payment of the price of the slave, and in this case the slave would be returned to the vendee. Again if the mansion was in the possession of the vendee, and meanwhile the slave died while in the possession of the vendor, then the sale is cancelled, and the vendee should return the mansion, but the pre-emptor is still entitled to take it on payment of the price of the slave. This is according to the *Mabsut*. If the option was reserved by the vendor of the mansion, and then another mansion by the side of it is sold, the vendor is entitled to pre-empt it. If he pre-empts it, then this fact would be considered as invalidating the contract of sale. This is according to the *Muḥīṭ*. If the option was reserved by the vendee, and then another house beside this house was sold, then the vendee is entitled to demand pre-emption in the latter house, and the fact of his pre-empting the latter house would be

الدار الا ولي
بالشفعة لم يكن له
علي الثانية سبيل
لا نه انما يتملكها
الان فلا يصير بها
جار الدار الاخرى
من وقت العقد
الاان تكون له دار
الي جنبها والدار
الثانيةسالمةللمشتري
لان اخذ الشفيع
من يده لا ينفي
ملكه من الاصل
ولهذا كانت عهدة
الشفيع عليه فلا
يتبين به انعدام
السبب في حقه
عين اخذهابالشفعة
كذا في المبسوط -
اذا اشترى دارا
ولم يكن راها ثم
بعيت دار بجنبها
فاخذها بالشفعة
لم يبطل خياره في
الرواتيةالصحيحة
لان الاخذ بالشفعة
دلالة الرضي وخيار
الروية لا يبطل
بالرضاءصريح فكذلك
بالرضاء دلالة كذا
في محيطالسرخسي-

considered as the confirmation of the original sale. If thereafter the pre-emptor appears and pre-empts the first sale from him, then he has no right by reason of his taking the first house in pre-emption, to demand pre-emption in the second house purchased for he (the pre-emptor) has acquired ownership just now, and therefore was not a neighbour of the second house at the time of its sale unless he happened to be owner of another adjacent house. Consequently the second house would remain the property of the vendee and the pre-emption of the first house does not in any way affect the second. This is according to the *Mabsūṭ*. If a vendee purchases a house and has not inspected it, meanwhile another house adjacent to it is sold, which he pre-empted, nevertheless according to the accepted view his option of inspection is not thereby invalidated because the act of pre-emption is merely considered as an implied acquiescence, while the option of inspection is not even invalidated by express acquiescence; hence implied acquiescence cannot invalidate the option. This is according to the *Muḥīṭ* of *Sarakhsī*.

١٣ - واذا اقتسم الشركاء العقار فلا شفعة لجارهم بالقسمة سواء كان القسمة بقضاء القاضي او بغير قضايه كذا في النهاية -

13. If the sharers of some immoveable property, *'aqār* have partitioned it between themselves, then their neighbour has no right of pre-emption at all and it is immaterial whether the partition was effected by the decree of the *Kāzī* or by mutual agreement. This is according to the *Nihāya.*

١٤ - ولا شفعة في الشراء الفاسد سواء كان المشترى مما يملك بالقبض او لا يملك وسواء كان المشتري قبض المشتري اولم يقبض وهذا . اذا وقع البيع . فاسدا في الابتداء اما اذا فسد بعد انعقاده صحيحا فحق الشفيع يبقي علي حاله الاترى ان النصراني اذا اشتري من نصراني دارا بخمر ولم يتقابضا حتي اسلما او اسلم احدهما او قبض . الدار ولم يقبض . الخمر فان البيع يفسد وللشفيع ان . ياخذ الدار بالشفعة

14. There is no pre-emption in a invalid sale, *fāsid,* whether the thing purchased is of such a nature that on taking its possession it ripens into ownership or whether the vendee has taken possession of it or not. This effect follows if the sale were invalid *ab initio* for if a valid sale subsequently becomes invalid, then the right of pre-emption arises—for instance a Christian purchases from another Christian a house in exchange of wine, and before they have interchanged possessions both of them or one of them embraces Islam; or the house has been taken possession of but the wine was not; then in this case the sale becomes invalid owing to a subsequent cause, nevertheless the pre-emptor is entitled to demand pre-emption in the house. And if in an invalid sale the vendee has taken possession of the house and thus acquired its ownership,

وان فاسد البيع
المشتري اذا قبض
الدار المشتراة شرا*
فاسدا حتى صارت
ملكا له فبيعت دار
اخرى بجنب هذه الدار
فله الشفعة فان لم
ياخذ الدار الثانية
حتى استرده البايع
منه ما اشتري لم يكن
للمشتري ان ياخذها
بالشفعة · فان كان
المشتري اخذها ثم
استرد البيع بحكم
الفساد فالا خذ
بالشفعة ماض كذا
في المحيط -

١٥ - وان اشتراها
شرا* فاسدا ولم
يقبضها حتى بعيت
دار الى جنبها
فللبايع ان ياخذ
هذه الدار بالشفعة لان
الاولى في ملكه بعد
فيكون جارا بملك
للدار الاخرى ثم ان
سلمها البايع قبل
الحكم بالشفعة
بطلت شفعة ولا
شفعة فيها للمشتري
لان جوازه حادث
بعد بيع تلك الدار
كذا في المبسوط -

thereafter another adjacent house is sold beside this first house, then he is entitled to pre-empt the second house. However if before he had taken possession of the second house the vendor rescinded the contract of sale on account of it being invalid, then he (vendee) would not be entitled to pre-emption whereas if he (vendee) had taken possession of the second house before the vendor had repudiated the first sale, then he would be entitled to keep the pre-empted house. This is according to the *Muḥīṭ*.

15. If a vendee purchases a house by an invalid sale, *fāsid*, and before he takes possession of it, another house beside it is sold, then the vendor of the house has the right to pre-empt the second house, for the first house is still in his ownership hence he is the pre-emptor to the second house sold; but if he (the vendor) had delivered possession of the house to the vendee after the right of pre-emption had accrued, then, thereby his own right had been invalidated and the vendee also has no right of pre-emption because he actually became neighbour after the sale of the second house. This is according to the *Mabsūṭ*. If a person buys a house by an invalid sale *fāsid*, then there is no

ومن ابتاع دارا شراء* فاسدا فلا شفعة فيها اما قبل القبض لبقاء ملك البايع فيها واما بعد القبض فلا حتمال الفسخ بني فيها ينقطع حق البايع في الا سترداد ويجب علي المشتري قيمتها وتجب للشفيع الشفعة فيها عند ابي حنيفة وعندهما لا ينقطع حقه في الا سترداد فلا يجب فيها الشفعة وللشفيع ان يامر المشتري بهدم البناء فان اتخذها المشتري مسجدا فعلي هذا الخلاف وقيل ينقطع حقه اجماعا كذا في الكافي ولو اسلم دارا في مائة قفيز حنطة وسلمها فللشفيع الشفعة ولو لم يسلمها حتي افترقا بطل السلم والشفعة

pre-emption in such a case whether before or after its possession. The right of pre-emption does not arise before the possession of the house is taken, because the ownership of the vendor continues in it and it does not arise after its possession, the sale still being avoidable; but if the vendee erects a building on it then the vendor's right to rescind the sale thereby is extinguished and the vendee must pay the price of the house and according to Imàm Abu Ḥanīfa the right of pre-emption arises in the house, but according to his two disciples the vendor's right to rescind the sale remains intact, and hence there is no right of pre-emption. In the former case the pre-emptor is entitled to order the vendee to demolish the building, but if the vendee has turned it into a *masjid*, then in this case there is difference of opinion. This is according to the *Kāfī*. If a person for the sale of 100 *qafiz*[1] of wheat, exchanged a house, and delivered its possession, then the pre-emptor is entitled to pre-empt it, but if possession has not been delivered and they (the parties) disagree, then the sale is invalid and hence no right of pre-emption arises. But if after the delivery of the house,

[1] *Qafiz* is a measure of weight roughly equivalent to 48 seers.

لانه فسخ ولوتنا قضا بعد الا فتراق والتسليم فلهبه الشفعة لانه ليس بفسخ في حق الشفيع بل بيع جديد كذا في القنية -

they attempt to break the contract then pre-emption arises in the house, for the contract is really not void as against the pre-emptor, for it amounts to a new contract of sale. This is according to the *Qunyah*.

١٦ - رجل اوصى له بدار ولم يعلم حتى بيعت دار بجنبها ثم قبل الوصية فلا شفعة له ولو مات قبل ان يعلم بالوصية ثم بيعت الدار بجنبها فادعى الورثة شفعتها فلهم ذلك لان موته صار بمنزلة قبوله كذا في الفتاوي الكبرى -

16. A house is bequeathed to a person, but he is not aware of it; meanwhile another house adjacent to it is sold, thereafter if he (the legatee) accepts the legacy, he is not entitled to pre-empt the house; however if he died before he knew of the bequest, then his heirs would be entitled to claim pre-emption, because though dead he would be deemed to have accepted the bequest. This is according to the *Fatāwā-i-Kubrā*.

١٧ - ولو اوصى بغلة داره لرجل وبرقبتها لآخر فبيعت الدار بجنبها فشفعتها لصاحب الرقبة كذا في محيط السرخسي -

17. If the income of a house is bequeathed to one person and the house itself to another person, and meanwhile an adjacent house to it is sold, then the person to whom the house was bequeathed is entitled to pre-empt the second house sold. This is according to the *Muḥīṭ* of *Sarakhsī*.

١٨ - سفل لرجل وفوقه علو لغيره باع صاحب السفل سفله فلصاحب العلو الشفعة ولو باع صاحب العلو علوه فلصاحب السفل

18. The upper story of a house belongs to one person and the lower story to another person. If the owner of the lower story sells it, the owner of the upper story is entitled to pre-empt it. If the owner of the upper story sells

الشفعة فبعد ذلك
ان كان طريق
العلو في السفل كان
حق الشفعة بسبب
الشركة في الطريق
وان كان طريق
العلو في السكة
العظمي كان حق
الشفعة بسبب الجوار
فان لم ياخذ
صاحب العلو السفل
بالشفعة حتي انهدم
العلو فعلي قول ابي
حنيفة و ابي يوسف رح
تبطل شفعة وعلي قول
محمد رح لا تبطل
ولو بيع السفل
والعلو منهدم فعلي
قياس قول ابي
يوسف رح لا شفعة
لصاحب العلو بناء
علي ان عنده
حق الشفعة بسبب
البناء وعنده محمد رح
له حق الشفعة لان
عنده حق الشفعة
بسبب قرار البناء
لا بسبب نفس البناء

it, the owner of the lower story is entitled to pre-empt it. In this case, if the way of the upper story passes through the lower, then the right of pre-emption arises on account of partnership in the way; but if the way of the upper story opens into the thoroughfare, then the right arises by reason of neighbourhood. However if the owner of the upper story does not pre-empt the lower one till the upper story is destroyed, then according to Imām Abu Ḥanīfa and Imām Abu Yusuf, the right of pre-emption is extinguished whereas according to Imām Muḥammad the right of pre-emption is not invalidated. If the lower story is sold while the upper one is in a state of demolition, then Imām Abu Yūsuf holds applying the doctrine of *qiyas*[1] that the owner of the upper story has no right of pre-emption because according to him it arises on account of the building, but according to Imām Muḥammad, he has the right, because his right of pre-emption arises on account of the right to erect the building and not on account of the building itself, and the right of its erection continues. This

[1] A process of deduction, known as Analogy.

وحق قرار العلو باق
كذا في الذخيرة –
وان كان السفل لرجل
و علوه لاخر فبيعت
دار بجنبها فالشفعة
لهما فان انهدمت
الدار قبل اخذ
الشفعة فالشفعة
لصاحب السفل عند
ابي يوسف رح لقيام
مايستحق به الشفعة
وهو الارض ولاشفعة
لصاحب العلو لزوال
ما كان يستحق
به الشفعة وقال
محمد رح الشفعة لهما
لان حقه قايم ايضا
فانه يبني العلو
اذا بني صاحب
السفل سفله وله ان
يبني السفل بنفسه
ثم يبني عليه العلو
ويمنع لصاحب السفل
عن الانتفاع حتى
يعطيه حقه كذا
في الكافي –

is according to the *Zakhīra*. If the upper story of a mansion belongs to one person and the lower one to another, and then another house adjacent to it is sold, then both of them are entitled to pre-empt it. But if the mansion by reason of which pre-emption is demanded is destroyed before the claim of pre-emption in the house sold was made, then according to Imām Abu Yūsuf, the right of pre-emption belongs to the owner of the lower story, for he maintains that the land by reason of which the right of pre-emption accrues is still in existence; while there is no right of pre-emption in existence for the owner of the upper floor on account of the destruction of the mansion itself, by reason of which pre-emption could have been demanded; while Imām Muḥammad holds that pre-emption appertains equally well to both of them; for he says that the right of the owner of the upper floor subsists, that is, his right to rebuild it continues; and moreover he has also the right to rebuild the lower story himself, and then erect the upper floor on it, and prevent the owner of the lower story from taking advantage of the lower story until the expenses are defrayed. This is according to the *Kāfi*.

١٩-رجلان اشتريا دارا واحدهما شفيعها فلا شفعة للشفيع فيما صار لا اجنبي لان شراء الاجنبي لا يتم الا بقبول الشفيع البيع لنفسه كذا فى فتاوى قاضي خان -

19. Two persons purchase a house while one of them is its pre-emptor, then the pre-emptor is not entitled to pre-empt that portion which is the property of the stranger because the purchase of the stranger did not become complete till the pre-emptor accepted the sale for himself. This is according to the *Fatāwā-i-Qāzī Khān*.

٢٠ - رجل آجر داره مدة معلومة ثم باعها قبل مضي المدة و المستاجر شفيعها فالبيع موقوف في حق المستاجر لقيام الاجارة فان اجاز المستاجر البيع نفذ في حقه وكان له الشفعة لوجود سببها وان لم يجز البيع لكن طلب الشفعة بطلت الا جارة كذا في محيط السرخسي -

20. A person rents his house for a specified period of time and then before the period expires he sells it to another. Now if the tenant happens to be its pre-emptor, then in this case the sale is withheld on account of the existence of the tenancy as against the right of the tenant to pre-empt. Thus if he (the tenant) acquiesces in the sale, then the sale is complete as against his right of tenancy; but the right of pre-emption arises in his favour, because the cause of pre-emption has accrued; however, if he does not acquiesce in the sale, and demands pre-emption in the house, then also his right of tenancy is terminated. This is according to the *Muhīt* of *Sarakhsī*.

٢١ - واذا اشترى ارضا مبذورة فنبت الزرع وحصده المشتري ثم حضر الشفيع اخذ الارض بحصتها

21. If a person purchases a land with seeds sown in it and subsequently the crops grow which he gathers, thereafter the pre-emptor appears, then he would be entitled to take the land

فتقوم الارض مبذورة
فيرجع بحصتها
كذا في محيط
السرخسي -

for a price equivalent to its value; that is the sale consideration shall be apportioned between the value of the land with the seeds and without the seeds. This is according to the *Muḥīṭ* of *Sarakhsi*.

٢٢ - واذا اشترى
نخلا ليقطعه فلا شفعة
فيه و كذلك اذا
اشترى به مطلقا فان
اشتراها باصولها
ومواضعها من
الارض ففيها الشفعة
و كذلك لو اشترى زرعا
او رطبة ليجذها لم
يكن في ذلك شفعة
وان اشتراها مع
الارض وجبت الشفعة
في الكل استحسانا
وفي القياس لا شفعة
في الزرع واذا اشترى
ارضا فيها شجر
صغار فكبر فاثمرت
او كان فيها زرع
فادرك فللشفيع ان
ياخذ جميع ذلك بالثمن
كذا في المبسوط -
اذا اشتري البناء ليقلعه
فلا شفعة للشفيع

22. If a person purchases a palm tree to cut it down, or purchases it absolutely without any condition, then there is no right of pre-emption in it; but if he purchased it along with the ground on which it stands, then it is liable to pre-emption. Similarly if a person purchases a crop or a part of it to cut it down, there is no right of pre-emption in it. But if it is purchased together with the field on which it stands then according to the doctrine of *Istiḥsān*,[1] it is liable to pre-emption but according to the doctrine of *qiyās*, there is no right of pre-emption. And if a person purchases a land in which there are small trees which afterwards bore fruit, or in which there is a crop which afterwards ripened, the pre-emptor would be entitled to take it all for the negotiated price. This is according to the *Mabsūt*. If a person purchases a building in order to pull it down, it is not liable to pre-

[1] Istihsān is equivalent to the modern notion of "equity" and it is recognised by the Hanafi School only.

فيه فان اشتراه باصله فللشفيع فيه الشفعة كذا في الذخيره -

emption; but if he purchased it together with the site on which it stands, then the right of pre-emption arises in it. This is according to the *Zakhīra*.

٢٣ - ولو اشتري نصيب البايع من البناء وهو النصف منن البناء فلا شفعة في هذا والبيع فيه فاسد وكذلك لو كان البناء كله لانسان فباع نصفه كذا في المبسوط -

23. If a person purchases the share of the vendor in a building (which is half the building), there is no right of pre-emption in it, for the contract of sale is invalid *fāsid* and similarly when the whole of a building belongs to a person, and if he sells half of it, the same effect follows as it does in the above case. This is according to the *Mabsūt*.

٢٤ - و اذا اشتري نخلا ليقطعها ثم اشتري بعد ذلك الارض وترك النخل فيها فلا شفعة للشفيع في النخل وكذلك لو اشتري الثمرة ليجذها والبناء ليهدمه ثم اشتري الارض لم تكن للشفيع الشفعة الا في الارض خاصة كذا في المحيط -

24. If a person purchases a tree in order to cut it down, afterwards he purchases the ground on which the tree stands and now leaves the tree without cutting it down, then the pre-emptor is not entitled to pre-empt the tree itself. And similarly if a person purchases fruits to pluck them, or the building to pull it down, and thereafter purchases the ground, then the pre-emptor is not entitled to pre-empt anything except the ground itself. This is according to the *Muḥīṭ*.

٢٥ - ولو اشتري بيتا ورحي ماء فيه و نهرها و متاعها فللشفيع الشفعة

25. If a person purchases a house together with a water mill and the stream, and all its accessories, then the pre-emptor is entitled to pre-empt the house together

في البيت وفي جميع
ما كان من آلات الرحي
المركبة ببيت
الرحي لانها تابعة
بيت الرحي وعلي
هذا اذا اشتري
الحمام فللشفيع
ان ياخذ بالشفعة
الحمام مع آلاتها
المركبة من القدر
وغيرها ولا ياخذ
ما كان مزا بلا
للبيت في المسئلة
الاولي والحمام في
المسئلة الثانية
الا الحجر الاعلي
من الرحي فانه
ياخذه بالشفعة
استحسانا وان
لم يكن مركبا كذا
في الظهيرية -
٢٦-ولو اشتري اجمة
فيها قصب وسمك
يوخذ بغير صيد
اخذ الا جمة
والقصب بالشفعة
ولم ياخذ السمك
واذا اشتري عينا
اونهرا اوبئرا باصلها
فللشفيع فيها الشفعة
وكذلك ان كانت
عين قير او نفط
اوموضع ملح اخذ
جميع ذلك بالشفعة
لوجود الاتصال
معني الاان يكون
المشتري قد حمل
ذلك من موضعه
فلا ياخذ ما حمل
منه كذا في المبسوط -

with all these for they are all accessories to the mill house; and similarly if a person purchases a bath, the pre-emptor is entitled to pre-empt not only the bath but all its accessories, water, utensils, etc., which it contains. But the pre-emptor is not entitled to pre-empt what is distinct and separate from the bath in the latter case and from the mill house in the former case except the upper grinding stone of the mill. For this he can pre-empt according to the doctrine of *Istiḥsān* though it is not an actual part of the house. This is according to the *Zahiriyya*.

26. If a person purchases a forest in which there are woods and fish which can be caught without netting, then the pre-emptor is entitled to pre-empt the forest and the woods but not the fish. And if a person purchases a stream, or a rivulet or a well together with its area, then the pre-emptor is entitled to pre-empt all. And similarly he can pre-empt every one of it whether it is a stream, or a salt-mine for all these are pre-emptible. But if the vendee has removed a part of these things then the pre-emptor has no right to claim that at all. This is according to the *Mabsūt*

وفي التفريد
وللشفيع ان ياخذ
ما دخل في البناء
والكنيف وكل شي
اما الظلة ان كان
مفتحها في الدار
عند هما يدخل
وعند ابي حنيفه رح
علي التفصيل ان
قال بكل حق هولها
يدخل والا فلا
الثمر والشجر
والزرع لا يدخل
الا بالشرط والقياس
ان يدخل الثمر
من غير الذكر كذا
في التاتار خانية -
٢٧-اشترى كرما وله
شفيع غائب فاثمرت الا
شجار فاكلها المشتري
ثم حضر الشفيع
الغائب واخذ الكرم
بالشفعة فان كانت
الا شجار وقت
قبض المشتري ذات
ورد ولم يبد الطلع
من الورد لا يسقط
شئي من الثمن
وان كان قد بدا
الطلع وقت قبض
المشتري الكرم يسقط

and according to the *Tafrīd* the pre-emptor is entitled to pre-empt all that is within a house together with latrines except *Zilla* (a shed). But if the shed is attached to the house, then according to two disciples it is a part of the house. Imàm Abu Ḥanīfa explains it thus; "If it comes within all the rights of the house, it would be considered as a part of the house, and if it does not, then it will be considered as separate." Fruits, trees and crops are not included in a sale unless specifically mentioned but according to *qiyās* fruits as included without specific mention. This is according to the *Tātār Khāniya.*

27. If a person purchases a vine-yard while its pre-emptor is absent and the vines bore fruit which the vendee appropriated, thereafter the pre-emptor appears and demands the vine-yard in pre-emption. In this case, if the vines were only blooming at the time of taking possession, and the fruits were not shooting forth, no remission will be made from the price; whereas if the fruits were in existence at the time of taking possession by the vendee, then a deduction equal to the price of the fruits would be made from the sale consideration of

بقدر ذلك ويعتبر قيمة يوم قبض المشتري الكرم كذا في الذخيرة وان كان للمشتري ارضا فيها زرع لا قيمة له فادرك الزرع وحصده المشتري ثم جاء الشفيع واخذ الارض لا يسقط شئي من ذلك الثمن كذا في محيط السرخسي -

٢٨ - المكاتب اذا باع او اشترى دارا والمولى شفيعها فله ان ياخذ بالشفعة سواء كان عليه دين اولم يكن كذا في البدايع - ولو باع المولى دارا ومكاتبه شفيعها كان له الشفعة كذا في التاتار خانية -

the vine-yard, and that price will be apportioned for the fruits which it fetched at the time when the vine-yard was taken possession of. This is according to the *Zakhīra.* If the purchased land was cultivated but was of no value at the time of sale but afterwards the crops ripened, and the vendee gathered it, then in this case, if the pre-emptor appears and pre-empts the land, no remission will be made from the price. This is according to the *Muḥīṭ* of *Sarakhsi.*

28. If a slave *mukātib*[1] sells or purchases a house, and his master is its pre-emptor, then he is entitled to pre-empt it; it is immaterial whether he (slave) was in debt or not. This is according to the *Badāyi.* If the master of the slave sells a house, and his slave *mukātib* is its pre-emptor, then he is entitled to pre-emption. This is according to the *Tātār Khāniyya.*

[1] Mukātib means a slave who could purchase his freedom from his master at a stipulated sum.

الباب الثاني

في بيان مراتب الشفعة اذا اجتمعت

٢٩ - يراعي فيها الترتيب فيقدم الشريك علي الخليط والخليط علي الجار فان سلم الشريك وجبت الشفعة للخليط واذا اجتمع خليطان يقدم الاخص ثم الاعم وان سلم الخليط وجبت للجار وهذا جواب ظاهر الروايته وهو تصحيح لان كل واحد من هذه الاشياء الثلثة سبب صالح للاستحقاق وانه يرجح البعض علي البعض للقوة في التاثير فاذا سلم الشريك التحقت شركة بالعدم ويجعل كانها لم تكن فيراعي

CHAPTER II

THE CLASSES OF PRE-EMPTORS.

29. When several pre-emptors claim pre-emption, they would be thus classified. A *Sharīk*[1] (or a partner in the substance of a thing) is preferred to a *Khalīṭ*[1] (or a partner in its rights) and a *Khalīṭ* is preferred to a *jār* (neighbour). If the *Sharīk* relinquishes his right, the *Khalīṭ* is next entitled to it and among *Khalīṭs* the special is preferred to the general. If a *Khalīṭ* gives up his right, then *Jār* the neighbour is entitled to pre-empt the property. This is according to the *Zahir* ***Riwayat***, and it is correct because these three qualifications are adequate cause to establish the right of pre-emption and they are in order of preference. Thus when a *Sharīk* gives up his right, his partnership shall be deemed to be no longer in existence as if there was no partnership at all and then the

---

[1] *i. e.*, Shafi'-i-Sharīk, Shafi-'i-Khalīṭ, and Shafi-'i-Jâr, this is the accepted terminology used by writers of Anglo-Muhammadan Law but according to the Arabic text it is incorrect, the jurists use the term ***Khalīṭ*** for the first as well as second class of pre-emptors.

الترتب في الباقي
لما لو اجتمع الخلط
والجوار ابتداء
وبيان هذا دار بين
رجلين في سكة غير
نافذة طريقهما من هذه
السكة باع احدهما
نصيبه فالشفعة لشريكه
فان سلم فالشفعة
لاهل السكة كلهم
يستوي فيها الملاصق
وبغير الملاصق لا
نهم كلهم خليط
في الطريق فان
سلموا فالشفعة للجار
الملاصق ولو انشعبت
من هذه السكة سكة
اخرى غير نافذة فبيعت
دار فيها فالشفعة
لاهل هذه السكة
خاصة لان خلطة اهل
هذه السكة اخص
من خلطة اهل
السكة العليا وان
بيعت دار السكة
العليا فالشفعة لاهل
السكة العليا واهل
السكة السفلي لان
خلطتهم في السكة
العليا سواء وقال
محمد اهل الدرب
يستحقون الشفعة
بالطريق ان كان
ملكهم او كان فناء
غير مملوك وان
كانت السكة نافذة

order of preference begins from the *Khalīṭ*. To illustrate this, let us take an example of a mansion which is situated in a blind street, it belongs to two persons and one of them sells his share. Then the right of pre-emption belongs in the first place, to the other partner in the mansion, and if he relinquishes his right, it belongs to the inhabitants of the street equally without any distinction whether contiguous neighbours or not for they all are *Khalīṭs* in the way. And if they all give up their right, then it belongs to ***jār-i-mulāṣiq*** a neighbour behind the mansion. If another blind street branches off from this street, and a house in it is sold then the right of pre-emption belongs to the inhabitants of this inner street; because they are more intermixed with it and form a special class rather than the people of the other street. But if a house is sold in the latter street, then the right of pre-emption belongs to the people of the former as well as to those of the latter street for they are all equally interested in the right of way. Imam Muḥammad holds that *Ahli-darb*, persons of the locality, are entitled to pre-empt by reason of the right of private

فبيعت دار فيها
فلا شفعة الا للجار
الملاصق وكذلك
دار ان بنيها طريق
نافذ غير مملوك
فبيعت احدهما
فلا شفعة الا للجار
الملاصق وان كان
مملوكا فهي في
حكم غير النافذ
والطريق النافذ
الذي لا يستحق
به الشفعة ما لا يملك
اهله سدة وعلى هذا
يخرج النهر اذا كان
صغيرا لتسقي منه اراض
معدودة او كروم
معدودة فبيعت ارض
منها او كرم ان
الشركاء كلهم شفعاء
يستوي الملاصق
وغير الملاصق
وان كان النهر
كبيرا فالشفعة للجار
الملاصق واختلف
في الحد الفاصل
بين الصغير والكبير
قال ابو حنيفه
و محمد اذا كان
تجري فيه السفن
فهو كبير وان كان
لاجري فهو صغير
هكذا في البدايع –
قال الشيخ
الامام عبد الواحد
الشيباني اراد

way. And if it were a public street, and a house were sold in it, then there would be no right of pre-emption except for the *Jār-i-Mulāṣiq*. In like manner, when there is a public road between two mansions, there is no right of pre-emption, except for the *Jār-i-Mulāṣiq*, but if this road were a private property then the same law as in the case of blind street will be applied. A thoroughfare, public road which does not give rise to the right of pre-emption is a street in which its inhabitants have no right to close it up. And similarly as regard a *nahr* canal which irrigates several lands or several vineyards—if any land from amongst these lands or vineyards is sold then all the partners are pre-emptors without any distinction between those who are contiguous or not. But if the canal was a big one, then the right of pre-emption belongs only to the *Jār-i-Mulāṣiq*. There is some difference of opinion as to the distinction between a small and a large canal—Imam Abu Hanifa and Imam Muhammad hold that when boats cannot ply through a canal it is small, and when boats can ply through it, then it is a big canal. It is so stated in the Bādīyā'. Shaikh Imam, Abdul Wāhīd-al-Shaibānī

لسفن ههنا الشمار
يات التي هي اصغر
السفن كذا في
الذخيرة ولونزع من
هذالنهرنهرا آخر فيه
ارضون او بساتين
او كروم فبيعت ارض
او بستان شربه من
هذا النهر النازع
فاهل هذا النهرا
حق بالشفعة من
النهر الكبير ولو
بيعت ارض علي
النهر الكبير كان
اهله و اهل النهر
النازع في الشفعة
سواءلاستوا يهم في
الشرب هكذا في
البدايع -
٣٠ - وان كان فناء
منفرجا عن الطريق
الاعظم او زقاق
او درب غير نافذ
فيه دور فبيعت
دار منها فاصحاب
الدور شفعاء جميعا
قال الشيخ الامام
الزاهد عبدالواحد
الشيباني رح هذا
اذا كان الفناء مربعا
فاما اذا كان مدورا
فالشفعة للجار
الملازق كذا في
الظهيرية - بيت
في دار في سكة غير

has said that here, the term *shumāriyāt*, means small boats. This is according to *Zakhīra*. If another canal branches out from this (big) canal, and irrigates several lands, gardens and vineyards, and then a land or a garden irrigated by this branch canal is sold, then the people of this same canal are entitled to the right of pre-emption rather than those of the big canal. But if a land on the big canal is sold, then its participators as well as those of the small canal are all equally entitled to pre-emption, inasmuch as they are equally interested in the right of passage. This is according to the *Badāyi'*.

30. If a tract of land, *ziqāq* or a road or a blind lane, a public *darb* leads out from a main public road and one of several houses situated in it is sold, then all the owners of other houses are its pre-emptors. Imām Shaibānī holds that this happens when the tract of land is a square, but if it is round, then the right of pre-emption belongs to *Jār-i-Mulāziq*, the contiguous neighbour. It is so stated in the *Zāhiryya*. A house is situated in an enclosure in a blind lane. The house belongs to two persons, whereas the enclosure is the property of a tribe. One

غير نافذة و البيت
لاثنين والدار لقوم
فباع احد الشريكين
نصيبه من البيت
فالشفعة اولا للشريك
في البيت فان سلم
فللشريك الدار فان
سلم فلاهل السكة
الكل في ذلك علي
السواء فان سلموا
فللجار الملا · صق
وهوالذي علي ظهر
هذه الدار و باب
داره في سكة اخر
في شرح ادب القاضي
للخصاف في باب
الشفعة فان كان
لهذه الدار التي
هذالبيت هو فيها
جيران ملازقون
فالذي هو ملازق هذا
البيت المبيع والذي
هو ملازق لا قصي
الدار لا لهذا البيت
في الشفعة علي السواء
وكذا في المحيط -
٣١ - دار بين شريكين
في سكة غير نافذة باع
احد الشريكين نصيبه
من الدار من انسان
فالشفعة اولا للشريك
في الدار فان سلم
فللشريك في الحائط
المشترك الذي
يكون بين الدارين

of the partners of the house sells his share. In this case in the first instance the right of pre-emption belongs to the other partner in the house, and if he has given up his right, then the right devolves on the partners of the enclosure, and if they also surrender their right, then it devolves on all people of the lane; and if they too surrender their right, it passes to the *Jār-i-Mulāṣiq*, *i.e.*, the neighbour behind the house, the door of whose house opens into another lane. It is mentioned by Khisâf's in *Adab-ul-Qāzī* in the chapter of pre-emption that if there are several *Jār-i-Mulāziq* of the enclosure in which the house is sold, then the person entitled is the nearest contiguous neighbour of this house, and not the person who is neighbour of the enclosure at its farthest end, therefore all are not equally entitled. This is according to the *Muḥīṭ*.

31. A house belonging to two partners is situated in a blind lane. One of the partners sells his share to a person, thus the right of pre-emption, in the first instance appertains to the other partner in the house, and if he surrenders it, then the right appertains to the person who is a partner on that wall which is a

فان سلم فلا هل
السكة الكل في ذلك
عي السواء فان
سلموا فللجار الذي
يكون ظهر هذه
الدار الي داره باب
تلك الدار في سكة
اخرى في ادب
القاضي للخصاف
ثم الجار الذى
هو موخر عن الشريك
في الطريق هو الذي
لايكون شريكا في
الارض التي هي تحت
الحائط الذي هو
مشترك بينهما اما
اذا كان شريكا فيه
لايكون موخر اهل
يكون مقدما و
صورة ذلك ان تكون
ارض بين اثنين
غير مقسومة بنيا في
وسطها حائطا ثم
اقتسما الباقي فيكون
الحائط و ما تحت
الحائط من الارض
مشتركا بينهما
فكان هذا الجار
شريكا في بعض
المبيع اما اذا
اقتسما الارض و
خطا خطا في
وسطها ثم اعطى
كل منهما شئيا حتي
بنيا حائطا فكل

common wall between his house and the vendor's house; and if he too surrenders his right, then it belongs equally to the people of the lane; and if they too surrender it, then it belongs to the person whose house is at the back of the house sold, and the door of whose house opens in another lane. It is mentioned in Khiṣāf's *Adab-ul-Qāzī* that the neighbour who has an inferior right than the partner in the way is the person who is not a partner in the property or the common wall, but if he is a partner in it, then he would be preferred to all partners in the way. The example illustrating this case is as follows:— There is an undivided land between two partners, and they build a wall in the middle of it, and then they divide the property between themselves but the wall and its site remain in their joint ownership; now such a neighbour is a partner in a part of the property. But if they divide the land between them and draw a line of separation in the middle of it, and each one contributes something towards the expenses and builds a wall, then each of them would be one another's neighbour as regards the land, and partners in the constructed wall but such

partnership in the constructed wall does not entail any preferable right of pre-emption. Imām Kudūrī has mentioned that partners in the strip of land on which the wall is situated are entitled to pre-empt the whole property sold by reason of the effect of partnership. This view is supported by Imām Muhammad and by one of the reports of Abu Yusuf. This is according to the *Zakhīra*. Imam Kurkhi says that the most correct view of Imam Abu Yusuf's is that the partner in the wall is preferable to a *jār*, and similarly certain problems of Imām Muhammad lead to the conclusion that the partner in the wall is preferred. Imam Muhammad has also said that if there is a wall between two persons and they both have inserted their beams in the wall, and they do not expressly know that the wall is a common property of them both except that both of them have their beams in the wall, and if one of the houses is sold, then if the other partner gives proof of the wall being a common wall, then he would be preferred to a mere *Shafi'-i-jār* because he is a partner, but if he does not establish it by evidence then he cannot be preferred to the

منهما جار لصاحبه
في الارض شريك في
البنا لاغير والشركة
في البنا لا توجب
الشفعة و ذكر
القدوري ان الشريك
في الارض التي تحت
الحائط يستحق
الشفعة في كل
المبيع بحكم الشركة
عند محمد رح
و احدي الروايتين
عن ابي يوسف
فيكون مقدما علي
الجار في ا كل المبيع
كذا في الذخيرة -
و قال الكرخي
واصح الروايات عن
ابي يوسف رح ان
الشريك في الحائط
اولي بقيمة الدار من
الجار و قال عن
محمد رح مسائل تدل
علي ان الشريك في
لحائط اولي فانه قال
في حائط بين
رجلين لكل واحد
منهما عليه خشبة
ولا يعلم ان الحائط
بينهما الا بالخشبة
فبيعت احدي
الدارين قال فان
اقام الاخر البنية ان
الحائط بينهما
فهوا حق من
الجار لانه شريك

و ان لم يقم بينة لم اجعله شريكا و قوله احق من الجار اي احق من الجميع لا بالحائط وهذا مقتضي ظاهر الاطلاق كذا في البدائع -

Shafi'-i-jār. This is according to the *Badayi'*.

٣٢ - قال محمد رحمه الله و في كل موضع سلم الشريك الشفعة فانما يثبت للجار حق الشفعة اذا كان الجار قد طلب الشفعة حين سمع البيع اما اذا لم يطلب الشفعة حتي سلم الشريك الشفعة فلا شفعة له كذا في المحيط

دار كبيرة فيها مقاصير باع صاحب الدار مقصورة او قطعة معلومة او بيتا فلجار الدار الشفعة فيها كان جارا من اي نواحيها لان المبيع من جملة الدار و لشفيع جار الدار فكان جارا للمبيع فان سلم الشفعة ثم باع المشتري مقصورة او القطعة المبيعة لم تكن الشفعة

32. Imām Muhammad has said that in every case where the partner has surrendered his right, it appertains to *shafi'-i-jār* provided he has demanded pre-emption as soon as he heard about the sale, but if he did not demand pre-emption until it was surrendered by the partner, then he is not entitled to enforce his right. This is according to the *Muḥīṭ*. There is a large enclosure containing several houses and plots of land. The owner of the enclosure sells a plot of land, or a specified tract, or a house in it, then the *Shafi'-i-jār* of the enclosure would be entitled to pre-empt it, no matter, on what side of the enclosure his property is situated. Because the thing sold is a part of the enclosure, therefore the neighbour of the enclosure is the neighbour of the thing sold. However if he surrenders his right thereafter the vendee sells that plot of land, or specified tract, or the house, then the right of pre-emption does not appertain

الا الجار هالان المبيع صار مقصود ا ومفرو ا ها لملك فخرج من ان يكون بعض الدار كذا في محيط السرخسي -

to any person except to the neighbour of the property sold, for now the property is deemed to be a single entity distinct from the enclosure, and in one individual's ownership. This is according to the *Muhīt of Sarakhsi.*

(۳۳) سفل بين رجلين و لاحدهما عليه علو بينه و بين آخر فباع الذي له نصيب في السفل والعلو نصيبه فلشريكه في السفل الشفعة في السفل ولشريكه في العلو الشفعة في العلو ولا شفعة لشريكه في السفل في العلو ولا شريكه في العلو في السفل لان شريكه في السفل جار للعلو و شريك في حقوق العلو ان كان طريق العلو فيه و شريكه في العلو جار للسفل او شريك في الحقوق اذا كان طريق العلو في تلك الدار فكان الشريك في عين البقعة اولي ولو كان لرجل علو علي دار و طريقه فيها و بقية الدار لآخر فباع صاحب العلو العلو بطريقه

33. The lower story of a house is shared between two persons, and the upper story is shared between one of the sharers of the lower story and some other person. Now a sharer sells his share in the lower as well as in the upper story. In this case, the sharer in the lower story is entitled to demand pre-emption in the lower story; and the sharer in the upper story is entitled to demand pre-emption in the upper story. There is no pre-emption for the sharer in lower story in the upper one and *vice versa*, for the partner in the lower story is a *jār* to the upper one, or at the utmost he is a partner in the right of way provided the way of the upper one passes through the lower story. Similarly the partner in the upper story is a *jār* to the lower or at the most he is a partner in the right of way, and under the law person who is the partner in the thing itself is preferred to all. If a person owns the upper story of a

ففي الاستحسان تجب الشفعة لصاحب السفل ولو كان طريق هذا العلوفي دار رجل آخر فبيع العلو فصاحب الدار التي فيها الطريق اولي بشفعة العلو من صاحب الدار التي عليها العلو فان سلم صاحب الطريق الشفعة فان لم يكن للعلو جار ملازق اخذه صاحب الدار التي عليها العلو بالجوار وان كان للعلو جار ملازق اخذه بالشفعة مع صاحب السفل لانهما جار ان و ان لم يكن جار العلو ملازقا و بين العلو وبين مسكنه طائفة من الدار فلا شفعة له ولو باع صاحب السفل السفل كان صاحب العلو شفيعا ولو بيعت الدار التي فيها طريق

house and the way of the upper story passes through a certain house, which belongs to some other person, then if the owner of the upper story sells it together with its way, then according to *Istiḥsan* the owner of the lower story is entitled to demand it in pre-emption, however since the way of the upper story passess through the house of some other person, then that person through whose property the way of the upper floor leads is preferred to the owner of the lower story. If the partner in the way surrenders his right and there is no *Jar-i-Mulāziq* to the upper floor who may demand pre-emption, then the owner of the lower story over which the upper stands is entitled to pre-empt it by reason of neighbour-hood, but if there is ***Jar-i-Mulāziq*** contiguous neighbour, then the owner of the lower story would demand pre-emption together with *Jār-i-Mulāziq* because they both are *Shafi'-i-jār* however if that pre-emptor was not a *bona fide Jār-i-Mulāziq* that is there was a strip of land between the upper story and his house, then he is not entitled to demand pre-emption at all. If the owner of the lower story sells his property then the owner of the upper floor

العلو فصاحب العلو
حق بشفعة الدار
من الجار هكذا
في البدايع -

is its pre-emptor; and if the house from which the way of the upper story passes is sold, then as regards pre-emption the owner of the upper story is preferred to any other *Shafi'-i-jār*. This is according to the *Badayi'*.

٣٤ - دار بين
رجلين ولا حدهما
حائط في الدار
بينه وبين آخر
فباع الذي له شركة
في الحائط نصيبه
من الدار والحائط
فالشريك في الدار
احق بشفعة الدار
والشريك في الحائط
اولى بالحائط وهو
جار في بقية الدار
وكذلك دار بين
رجلين و لاحدهما
بئر في الدار
بينه و بين آخر
فباع نصيبه من
الدار و البئر
فالشريك في الدار
احق بشفعة الدار
والشريك في البئر
احق بالبئر وهو جار
لبقية الدار كذا
في النهاية - و اذا

34. A house is shared between two partners, and one of them and some other person own one of its walls, in common partnership. Now the person who has the share in the house as well as in the wall sells it, then the partner in the house is preferred in demanding pre-emption in the house, and the partner in the wall is preferred in demanding pre-emption in the wall, and he (the latter) is a mere *Shafi'-i-jār*, with reference to the rest of the house. And similarly if there is a house shared by two persons, and one of the sharers with some other person owns a well in the house. Now the person who is a partner in the house as well in the well sells his share in both, then as regards pre-emption in the house the partner in the house is preferred and as regards the well the partner in the well is preferred and the partner in the well is a mere *Shafi'-i-jār*. with reference to the house. This is according to the *Nihāya*. A house is

كانت الدار بين ثلثة رجال الا موضع بئر اوطريق فيها فباع الشريك في الجميع نصيبه من جميع الدار فالشريك الذي له في جميع الدار نصيب احق من الاخر الذي له في بعض الدار نصيب فان شركة اعم ومن يكون اقوى فهو مقدم في الاستحقاق كذا في المبسوط -

shared between three partners, but the well and the way in it is not so shared. Now the person who is a partner in the house sells his share, then the other person who is a partner in the whole house has a preferential right to demand pre-emption in it than a person who is a partner in the way or the well only, because the person who is the partner in the whole house has a special right, and one who has the superior claim is entitled to demand pre-emption. This is according to the *Mabsuț*.

٣٥ - صاحب الطريق اولي بالشفعة من صاحب مسيل الماء اذا لم يكن موضع مسيل الماء ملكا له وصورة هذا اذا بيعت دار ولرجل فيها طريق وللاخر فيها مسيل الماء فصاحب الطريق اولي بالشفعة من صاحب مسيل الماء كذا في المحيط -

35. A person who has a right of way has a superior right of pre-emption to the person who has merely a right of water, and the bed of the water course does not belong to him. For example, when a house is sold, and a person has a right of way to it and the other person has the right of water across it, then the person who has the right of way has a superior right of pre-emption than the person who has the right of water. This is according to the *Muḥīț*.

٣٦ - دار فيها ثلثة بيوت بيت في اول الدار ثم البيت الثاني بجنب هذا البيت ثم البيت الثالث بجنب

36. In an enclosure there are three adjacent houses in a row : all belonging to different persons ; and one of these houses is sold, then if there is a common way within the enclosure to all the houses, the right

الثاني كل بيت لرجل واحد فباع واحد منهم بيته ان كان طريق البيوت في الدار كانت الشفعة للباقين بحكم الشركة في الطريق و ان كانت ابواب البيوت في سكة نافذة لا في الدار فان بيع لبيت الاوسط فالشفعة لصاحب الاعلى و الاسفل وان بيع لبيت الاعلى كانت الشفعة لصاحب الاوسط و ان بيع الاسفل كانت الشفعة لصاحب الاوسط لا غير ثلثة بيوت في دار كل واحد فرق لآخر كل واحد لانسان فباع واحد منهم بيتة فان كان طريق الكل في الدار فللباقيين ان يشتركا في الشفعة و ان كانت ابواب البيوت في السكة فان باع الاوسط فلا على والاسفل ان ياخذ الشفعة و ان باع الاعلى فالاوسط اولى و ان باع الاسفل فالاوسط ايضاً اولى هكذا في خزانة المفتين -

of pre-emption belongs to the other two owners by reason of partnership in the way; but if the doors of these houses are situated on the public road and not in the enclosure and the middle house is sold, then the right of pre-emption belongs to the owners of the first and the third houses, while if the first house or the third house were sold, then it belongs to the owner of the middle house. This is according to the *Khizānat-ul-Muftīn*.

٣٧ – دار فيها ثلثة ابيات ولها ساحة والساحة بين ثلثة نفر والبيوت بين اثنين منهم فباع احد مالكي البيوت نصيبه من البيوت والساحة من شريكه في البيوت والساحة فلا شفعة لشريكهما في الساحة كذا في الذخيرة – دار لرجل فيها بيت بينه وبين غيره فباع الرجل الدار فطلب الجار الشفعة وطلبها الشريك في البيت فصاحب الشريكة في البيت اولي بالبيت وبقية الدار بينهما نصفان هكذا في البدايع –

37. In an enclosure there are three houses and a ground. The ground is owned between three individuals and the houses between two of them. Now one of the owners of the houses sells his share in the houses as well as in the ground to the person who is also a partner in the houses as well as in the ground, then the two persons who are partners in the ground only are not entitled to demand pre-emption. This is according to the *Zakhīra*. A man owns an enclosure in which there is a house belonging to him and another person and he sells the enclosure whereupon a neighbour (of the enclosure) claims pre-emption, and pre-emption is also claimed by the partner in the house. In this case, as regards the house the latter is preferred; but with regard to the rest of the enclosure, they both are equally entitled. This is according to the *Badāyi'*.

٣٨ – وروي عن ابي يوسف رح فيمن اشترى حائطا بارضه ثم اشترى مابقي من الدار ثم طلب جار الحائط الشفعة فله الشفعة في الحائط ولا شفعة

38. And it is reported from Abu Yusuf, that when a person purchases a wall with the ground on which it stands and thereafter purchases the mansion, whereupon the neighbour of the wall claims pre-emption, then he is entitled to pre-empt the wall and not the mansion.

لہ في بقية الدار كذا في محيط السرخسي –

٣٩ – درب غير نافذ فيه دور لقوم باع رجل من ارباب تلك الدور بيتا شارعا في السكة العظمى ولم يبع طريقه في الدرب على ان يفتح مشتري البيت بابا الي الطريق الاعظم فلاصحاب الدرب الشفعة اشركتهم في الطريق وقت البيع فان سلموها ثم باع المشتري البيت بعد ذلك فلا شفعة لاهل الدرب لانعدام شركتهم في الطريق وقت البيع الثاني فتكون الشفعة للجار الملازق وهو صاحب الدار وكذلك اذا باع قطعة من الدار

This is according to the *Muḥīṭ* of *Sarakhsī*.

39. There is a blind *darb*,[1] in which there are enclosures belonging to a certain tribe. Now, one of the owners of the enclosures sells his house situated in the thoroughfare on the condition that the vendee of the house should open another door towards the highway and he retains the right of way to his own property situated in the ***darb***, then in this case the people of the ***darb*** have the right of pre-emption by reason of their being partners in the way at the time of sale, but if the people of the ***darb*** surrender their right in favour of the vendee, and later on the vendee sells that house, then at the time of second sale the people of the *darb* will have no right of pre-emption because their partnership in the way has been extinguished, and in this case the right of pre-emption belongs to the ***Jār-i-Mulāziq***, that is, the owner of the enclosure himself and similar is the case if the owner had sold a part of the enclosure

[1]. An habitation in the middle of which there is a ground and round which there are mansions belonging to several owners.

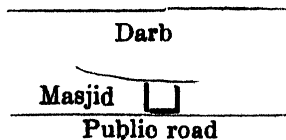
بغيرطريق في الدرب
كذا في الذخيرة -

٤٠ - درب غير
نافذ في اقصاه مسجد
خطة وباب المسجد
في الدرب و ظهر
المسجد او جانبه
الاخر الي الطريق
الاعظم فهذا و رب
نافذ لو بيعت فيه
دار لاشفعة الاللجار
واراد بمسجد
الخطة الذي اختطه
الامام حين قسم
بين الغانمين وهذا
لان المسجد اذا
كان خطة و ظهره
الي الطريق الاعظم
وليس حول المسجد
دور تحول بينه وبين
الطريق الاعظم
فهذا الدرب بمنزلة
درب نافذ ولو كان
حول المسجد دور
تحول بينه و بين
الطريق الاعظم كان
لاهل الدرب الشفعة

without the way in the *darb* itself. This is according to the *Zakhīra*.

40. There is a blind darb at the extreme end of which there is a *masjid-i-Khiṭṭa* and the door of the *masjid* is in the *darb*, and the back of the *masjid* or its other side is towards the public thoroughfare, then such a *darb* is a blind *darb*. Now if a house in the *darb* is sold, then the right of pre-emption does not belong to any one except the neighbour. By *masjid-i-Khiṭṭa* is meant that *masjid*, whose boundaries are defined by the Imām at the time of apportionment of the booty. However this is a case of *masjid-i-Khiṭṭa* whose back is towards a thoroughfare, and has no houses between it and the thoroughfare; but if there are houses around the *masjid* and between it and the thoroughfare, then such a *darb* is an open *darb*. Then the people of such *darb* have the right of pre-emption on account of partnership. If there is no *masjid-i-Khiṭṭa* at the extreme end, and it is situated in the first lane, and if the darb is continuous from the first

Darb.
Masjid Khitta.
Public road.



بالشركة لان هذا
الدرب لايكون نافذا
ولو لم يكن مسجد
الخطة في الاقصى
لكنه كان في اول
السكة فان كان
من اول السكة
الي موضع المسجد
نافذ لاتثبت فيه
الشفعة الا للجار
الملازق وما وراء
ذلك يكون غيرنافذ
حتي كان لاهل تلك
السكة كلهم الشفعة
ولولم يكن المسجد
خطة بان يشتري
اهل الدرب من
رجل من اهله دارا
في اقصي الدرب
ظهرها الي الطريق
الاعظم وجعلوها
مسجدا وجعلوا في
الدرب. بابه ولم
يجعلوا اله الي
الطريق الاعظم بابا
اوجعلو اثم باع رجل
من اهل الدرب
داره فلاهل الدرب
الشفعة با لشركة
كذا في المحيط -

lane to the *masjid*, then the right of pre-emption does not belong to any one except the *Jar-i-Mulāziq*. However if there be no *masjid-i-Khitta*. but the people living in the *darb* purchased a house and converted it into a *masjid* and its door is towards the *darb*, though not necessarily facing it and one of the members of the *darb* sells his house, then the people of the *darb* are entitled to demand pre-emption in it by reason of partnership. This is according to the *Muḥīt*.

٤١ - رجل له خان
فيه مسجد افرزه
صاحب الخان
واذن للناس بالتا
دين وصلوة الجماعة
فيه ففعلوا حتى
صار مسجدا ثم
باع صاحب الخان
كل حجرة في الخان
من رجل حتى صار
درباثم بيعت منها
حجرة قال محمد رح
الشفعة لجميعهم
كذا في فتاوى
قاضيخان دار فيها
طريق الى الدرب
و يخرج من باب
آخر منها الى الطريق
الاعظم فان كان
طريقا للناس فلا
شفعة لاهل الدرب
لان السكة نافذة
وان كان طريقا لاهل
الدرب خاصة فهم
شفعا لان السكة
غير نافذة كذا في
محيط السرخسي -
و اما الرقيقات
التي ظهرها واد لا
يخلو من وجهين
ان كان موضع
الوادي مملوكا في
الاصل واحد ثوا
الوادي فهذا و
المسجد الذي

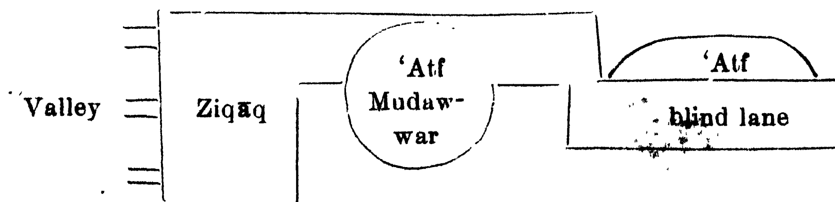
41. A person has an inn in which there is a *masjid*, and the owner of the inn has separated it from the inn and he permits the people to offer their prayers in it. The people have acted accordingly, and it is thereby transformed into a public *masjid*. Thereafter the owner of the inn sells all its apartments to different persons so that now it becomes a *darb*. Subsequently one of its apartments is sold, then according to Imam Muhammad, the owners of other apartments are entitled to pre-empt it. This is according to the ***Fatāwā-i-Kazi Khan***. There is a mansion, the way of which is towards the ***darb***, and a passage passes through it leading into a public road. Now if the way is public, then the people of ***darb*** have no pre-emption because the lane is an open one; but if the way is the property of the people of ***darb*** then they have the right of pre-emption, because now it is a blind lane. This is according to the *Muḥīt of Sarakhsi*. The case of *Ziqāq* on the back of which there is a *wādī* (valley) has two aspects:—(a) If the site of the valley is in somebody's ownership, and the people had turned it into a *wādī* (valley), then as regards the law of pre-emption the case of such a valley and the *masjid*

احد ثوا في اقصي
السكة سواء وان كان
في الاصل واديا
كذلك فهو و مسجد
الخطة سواء هكذا
حكي عن الشيخ
الامام الزاهد عبد
الواحد الشيباني ؒ
و كان يقول الرقيقات
التي علي ظهرها واد
ببخارا اذا بيع
في ذقيقة منها دار
فاهل الرقيقة كلهم
شفعا ولا يجعل
ذلك كالطريق النافذ
فكانه عرف انه
مملوك و كان الشيخ
الامام شمس الائمة
السرخسي ؒ يجعل حكم
هذه الرقيقات حكم
السكك النافذة قيل
ويجوزان يقاس التي
في اقصاها الوادي
ببخارا علي ماتقدم
ويبني امر الشفعة علي
النفاذ الحادث وعلي
نفاذ الخطة كذا
في المحيط - سكة
غير نافذة اذا بيعت
دار فيها فالشفعة
لجميع اهل السكة
ولافرق بين المدورة
والمعوجة والمستقيمة
كذا في الملتقط -

built at the extreme end of the land are the same. (b) If the *wādī* was originally a valley; then as regards pre-emption the case of this valley and the ***masjid-i-Khitta*** are the same. It is mentioned by Imām Shaikh 'Abdul Wāhid Shaibānī that if one of the houses of *Ziqāqs* of Bukhara, at the back of which there is a valley, is sold, then all the people of *Ziqāqs* are its pre-emptors and it will not be considered as a public place. It seems that Imām Shaibānī has ascertained the valley to be private. Imâm Shaikh Sarakhsī maintains that the effect of such *Ziqāqs* as regards pre-emption is similar to that of an open lane. (Some jurists) hold that it is lawful to consider the case of Bukhârâ at the extreme of which there is a valley, in terms of what has been said above and pre-emption should be made dependent upon this consideration. This is according to the *Muḥīṭ*. In a blind lane if a house is sold, then the right of pre-emption belongs to all the inhabitants of the lane, it is immaterial whether the blind lane was circular, curve or straight. This is according to the *Multaqaṭ*.

٤٢ – سكة غير نافذة
فيها عطف مدور يعبر
بالعطف الذي يقال
بالفارسة (خم كرد)
وفي العطف منازل
فباع رجل منزلا في اعلى
السكة او اسفلها او في
العطف فالشفعة
لجميع الشركاء
وان كان العطف
مربعا بان يكون
سكة ممدودة في كل
جانب منها زقيقة
وفي السكة دور وفي
الزقيقتين دور فباع
رجل في العطف
منزلا فالشفعة
لاصحاب العطف
دون اصحاب السكة
ولو باع رجل في
السكة دارا كانوا
فيها جميعا شفعاء
والحاصل ان بالعطف
المدور لا تصير السكة
في حكم السكتين
الا يرى ان هيات
الدور في هذا
العطف لا تتغير

42. In a blind lane there is a *'atf mudawwar*,* a circular round tract of land which is known in Persian as "Kham gird." In this tract *'atf* there are houses and the owner of one of them sells a house which is situate on the upper or lower end of the street or is situated on the curve itself, then the right of pre-emption belongs to all the partners. If this tract *'atf* is a square so that a lane extends from every corner of it to the *Ziqāq*, and there are houses in a lane as well as in *Ziqāq* and a person sells a house in the *'atf* tract, then pre-emption appertains to the members of the tract and not to the inhabitants of the lane; but if a person sells a house in the lane, then all of them are its pre-emptors. The result is that because the *'atf* is round, *mudawwar*, the lane, as regards, its effect is not treated like two distinct lanes, and in such an *'atf*, the situation of



كما في السكة
زقيقان اما العطف
المربع يصير في
حكم سكة اخرى
الايري ان هيات
الدور في هذا
العطف تتغير فيصير
بمنزلة سكة في سكة
كذا في الذخيرة -
٤٣ - سكة تذهب
طولا في اسفلها
سكة اخرى غير
نافذة بينها حاجز
درب و لا حق لاهل
السكة الا ولي فيها
فبيعت دار من السكة
العليا فلاهل
السفلى الشفعة
لشركتهم ولو بيعت
من السفلى فالشفعة
لاهلها خاصة و كذا
اذا كان فيها زائغة كذا
في القنية في المنتقى
ابن سماعة عن ابي
يوسف ر عن ابي
حنيفة ر في درب
فيه زائغة مستديرة
لجميع الدرب بيعت
دار في هذه الزائغة
التي عليها الدرب

the houses is not changed similarly as in the case of a lane. But if the *'atf* is a square, then it is treated as distinct lanes and the situation of the houses is changed. It becomes as if there is a lane within a lane. This is according to the *Zakhīra*.

43. A lane runs to a long distance and at the extreme end of it there is another blind lane. These two lanes are separated by a *darb*. The people living in the former lane are not interested in the latter lane. If a house is sold in the former lane, then the people of the latter lane have the right to pre-empt it on account of their partnership; but if a house is sold in the latter lane, the people of the latter lane also have the right of pre-emption. And similar would be the case if there is a *zaigha'* (turning) in the above mentioned lane. This is according to the *Qunya*. It is mentioned in the *Muntaqi* by Abu Samā'aḥ who received the report from Abu Yusuf and who in his turn received it from Imam Abu Hanifa that if there is a *darb* in which there is a round turning surrounding the whole *darb*, and if on this turning a house is sold, then all

فهم شركاء في الشفعة
واذا كان درب
مستطيل فيه زائغة
ليست على ماوصفت
لك ولكنها تشبهه
السكة فاهل تلك
الزائغة شركاء في
دورهم ولا يشركهم
اهل الدرب في
الشفعة وقال ابو
يوسف ﺭﺡ ذلك كله
سواء وهم شركاء
في زايغتهم دون
اهل الدرب كذا
في الذخيرة -

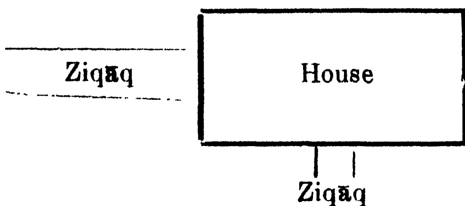
persons are entitled to pre-empt it; but if the *darb* is a long one and there is a turning, but not of the description as mentioned above, it resembles a lane, then the right of pre-emption in the house on the turning would appertain to the people living on the turning only and not to the people living in the *darb*. Imam Abu Yusuf holds that these two cases are identical and the people of the *darb* are pre-emptors in the house sold in the *darb*, and people on the turning are pre-emptors in the house sold on the turning. This is according to the *Zakhīra*.

٤٤ - هشام عن
محمد ﺭﺡ. رجل
اشترى بيتا من دار
الى جنب داره و
فتح بابه الي داره
ثم باع هذا البيت
وحده فجاء جار هذا
الرجل وطلب هذا
البيت بالشفعة قال
ان كان سد باب
البيت من تلك
الدار وفتح في هذه
الدار حتى عد
البيت من هذه
الدار فله الشفعة
فيه وفي الشفعة
للحسن بن زياد

44. A person buys an apartment in a house adjoined to his house, and opens a door from it towards his own house, thereafter he sold this apartment alone. The pre-emptor now appears and demands pre-emption in the apartment. As regards this case Hishām reports from Imâm Muḥammad that if the vendee had closed the original door and opened one towards his own house, so that the room formed part of the vendee's house, then the neighbour would be entitled to demand pre-emption. It is mentioned in the book of pre-emption by Hasan Ibn Ziyâd that there is a blind lane in

which there is a separate *'atfi'* plot of land, which is connected with the lane and a house in this plot of land is sold, then the right of pre-emption does not arise in favour of any person except the *Jār-ī-Mulāziq* of the house sold. However, if this *'atf* is not connected with the lane, then pre-emption belongs to all the people living in the *'atf* and if they give up their right, then also the people of the lane are not entitled to pre-empt the house. This is according to the *Muḥīṭ*. A house,* which has two doors opening into two *Ziqāqs*, is sold, then it will be considered whether the house was divided into two houses, that is, whether it originally had one door each opening in a different *Ziqāq* and a person, having purchased it, removed the intervening wall between them and so it became a single house, if so then the people living in each *Ziqāq* will be entitled to pre-empt that part of the house which

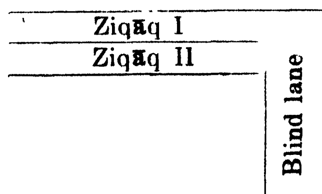
سكة غير نافذة فيها
عطفة منفردة نفذت
هذه العطفة من
جانب آخر الي هذه
السكة التي فيها
العطفة فبيعت دار
في هذه لعطفة فلا
شفعة فيها الا لمن
داره لزيق الدار
المبيعة ولو لم تنفذ
هذه العطفة الي
السكة كانت الشفعة
لجميع اهل هذه
العطفة فان سلموا
الشفعة ليس لاهل
السكة الشفعة فيها
كذا في المحيط-
دار بيعت و لها
بابان في زقاقين
ينظر ان كانت في
الاصل دارين باب
احدهما في زقاق
آخر فاشتراهما رجل
واحد ورفع الحائط
بينهما حتى صارت
كلها دار اواحدة
فلاهل كل زقاق ان



باخذ الجانب الذي
يليه وان كانت في
الاصل دارا واحدة
ولها بابان فالشفعة
لاهل الزقاقين في
جميع الدار بالسوية
ونظير هذا الزقاق
اذا كان في اسفلها
زقاق آخر الى جميع
الجانب الآخر
فرفع الحائط بينهما
حتي صار الكل سكة
واحدة كان لاهل
كل زقاق شفعة في
في الزقاق الذي
لهم خاصة ولا شفعة
لهم في الجانب
الآخر وكذا سكة
غير نافذة رفع
الحائط من اسفلها
حتي صارت نافذة
فهم فيها شركاء كذا
في محيط السرخسي -
٣٥ - وفي آخر شفعة
الاصل دار فيها
حجرة منها بين
رجلين فباع احد
هما نصيبه من

adjoins it. But if the house originally had two doors then the people living in the two *Ziqāqs* are equally entitled to pre-empt the whole house. To illustrate* further if there is a *Ziqāq* and below it there is another *Ziqāq* and below it there is another *Ziqāq*, thereafter the intervening wall which separates the two *Ziqāqs* is removed so that it now becomes one big street, then the people of each *Ziqāq* have a right of pre-emption in the property sold in their own *Ziqāq*, and would not be entitled to pre-empt the property in the other. And similarly if the wall of a blind lane is removed so that it becomes open, then all the people of the lane would be entitled to pre-emption by reason of partnership (in the way). This is according to ***Muḥīṭ*** of *Sarakhsī*.

45. It is written in the *Shaf'at-ul-Asl* that if there is a house in which there is an apartment shared between two persons, and one of them sells his share of the



الحجرة فهذا على وجهين ان كانت الحجرة مقسومة بينهما فالشفعة للشركاء في طريق الدار لا للشريك في الحجرة فان سلم شركاء الطريق في الدار الشفعة كانت الشفعة للجار الملازق بالدار كذافي المحيط - و اذا اشترى قوم ارضا فاقتسمو ها دورا وتركوا منها سكة ممشي لهم و هي سكة ممدودة غير نافذه فبيعت دار من اقصاها فهم جميعا شركاء في شفعتها ومن كان داره اسفل من الدار المبيعة او اعلى في الشفعة هنا سواء و كذلك ان كانوا ورثوا الدور عن آبا يهم كذلك ولا يعرفون كيف كان اصلها فهذا والاول سواء كذافي المبسوط في باب الشفعة في البناء وغيره - و اذا اشترى بيتا من دار علوه لآخر و طريق البيت

apartment to a stranger then this case has two aspects :—(*a*) If the apartment had been divided between them, then pre-emption belongs to all partners in the way of the house and not only to the partner in the apartment. (*b*) If all such partners of the way in the house surrender their right; then ***Shuf'a*** appertains to the ***jār-i-mulāziq*** of the house. This is according to the *Muḥīṭ*. A party purchases a land and distributes it among its members, giving them each such portion of it as is sufficient for a house, they also leave in it a blind street for communication purposes. A house is sold at the extreme end of the lane. then the members are entitled to pre-empt it and it makes no difference whether the house of the neighbour is on the upper or lower side of the house sold. And similarly if they had inherited the property from their ancestors and were not aware of full facts, then in this case also the law is the same. This is according to the ***Mab-***
sūṭ in the chapter on pre-emption. If such a house is purchased in an enlcosure, the upper story of which belongs to some other person, and the way of the house purchased lies in another enclosure, then

الذي اشترى في دار اخرى فانما الشفعة للذى في داره الطريق فان سلم صاحب الدار فحينئذ لصاحب العلو الشفعة با لجوار كذا في المبسوط في باب الشفعة بالعروض -

the right of pre-emption belongs to the person through whose enclosure the way passes. If the owner of the enclosure surrenders his right, then the right of pre-emption belongs to the owner of the upper story of the house by reason of neighbourhood. This is according to the *Mabsūṭ* in the chapter on *Shufa'fil-Uruz.*

۴٦ - و اذا كان للدار جاران احدهما غائب والآخر حاضر فخاصم الحاضر الى قاض لايري الشفعة با لجوار فابطل شفعة ثم حضر الغائب فخاصمه الى قاض يرى الشفعة فقضى له بجميع الدار ولو كان القاضي الاول قال ابطل كل الشفعة التي تتعلق بهذه الدار لم تبطل شفعة الغائب كذا قاله محمد رح وهو الصحيح كذا في البدايع -

46. And if there are two ***shafi'-i-jars*** but one of them is absent and the other is present. And the present ***shafī'-i-jār*** brings a suit before the ***Kazi*** [1] who does not decree *shuf'a biljawār* pre-emption on the ground of neighbourhood, and the *Kazi* invalidates the right and dismisses the suit. Thereafter the absentee pre-emptor appears and brings his suit before the *Kazi*[2] who decrees *Shufa-bil-jawār* and the *Kazi* decrees the whole house to him, though the first *Kazi* had said, "I invalidate all right of pre-emption which appertains to this house," nevertheless the right of the absentee is not invalidated. Imâm Muḥammad holds the same view, which is correct. This is according to the *Badā'yi'*.

[1] Here the Kazi administers the Shafi' Law
[2] This Kazi administers the Hanafi Law.

٤٧ - دار ورثتها جماعة عن ابيهم مات بعض ولد ابيهم وترك نصيبه ميراثا بين ورثة وهم ثلثه بنين فباع احدهم نصيبه منها فشركاؤه في ميراث ابيهم وهم ابناء الميت الثاني و شركاء الاب وهم اولاد الميت الاول شفعاء فيها ليس بعضهم اولى من البعض كذا فى المحيط - للحسن بن زياد قوم ورثوا دارا فيها منازل و اقتسموها فاصاب كل واحد منها منزلا فرفعوا فيما بينهم الطريق فباع من صار له منزله وسلم الذين لهم المنازل في الدار الشفعة كان للجار الشفعة اذا كان لزيق المنزل الذي بيع وان كان لزيق الطريق الذي بينهم وليس بلزيق المنزل كان له ان ياخذ المنزل بطريقه بالشفعة وان لم يكن لزيق المنزل ولا لزيق الطرق الذي بينهم وكان

47. A person died and he left a house in inheritance to his heirs, later on a certain heir died and he left his share in inheritance to his three sons as his heirs. Later on one of the sons sold his share of the inheritance, then the right of pre-emption equally belongs to the descendants of the vendor's father and grandfather and no one from amongst them has a preferential right as against the other. This is according to the *Muḥīṭ*. In the chapter on pre-emption by Hasan Ibn Ziyad it is stated that a certain tribe inherited an enclosure in which there were several houses. Thereafter these members of the tribe divided the enclosure among themselves each receiving a house for himself and leaving a common way. Thereafter one of the members sells his house and all other owners of the houses surrender their right of pre-emption in the house, then the right appertains to the contiguous neighbour of the enclosure. Thus if he were a contiguous neighbour to the enclosure and not to the house, then also he has a right to pre-empt it by virtue of neighbourhood ; and if he were not a contiguous neighbour to the enclosure, but is a contiguous neighbour to

لزيق منزل آخر من الدار فلا شفعة فهذه المسئلة دليل علي ان الشفعة كما تجب لجيران المبيع تجب لجيران حق المبيع ايضا كذا في الذخيرة – و في كتا ب الشرب لابي ،عمر والطبري دار فيها ثلثة ابيات وكل بيت لرجل علي حدة و طريق كل بيت في هذه الدار وطريق هذه الدار في دار اخري وطريق تلك الدار في سكة غير نا فذة بيع بيت من البيوت التي في الدار الداخلة كان صاحب البيتين اولي بالشفعة من صاحب الدار الخارجة فان سلم الشفعة فالشفعة لصاحب الدار الخارجه فان سلم هو ايضا فالشفعة لا هل السكة ارض بين قوم اقتسموها بينهم ورفعو اطريقا بينهم وجعلوانافذة ثم بنوا دور ايمنة ويسرة وجعلوا ابواب

some other houses of the lane, then he has no right of pre-emption. This illustrates the view that the right of pre-emption arises in favour of a neighbour and it also arises in favour of the person who is, the neighbour to the enclosure. This is according to the *Zakhīra*. In the chapter on *Shurb* by Abu ʿUmar al-Ṭabarī, there is mentioned a case of an enclosure in which there are three houses owned by three different owners. The houses have a common way through the enclosure and that the way of this enclosure passes through another enclosure and the way of that enclosure opens into a blind lane. Now if a house on the inner enclosure is sold, then the owners of the two houses have a preferential right to the owner of the outer enclosure and if they surrender their right, then it belongs to the owner of the outer enclosure, and if he also surrenders it, it belongs to all persons living in the street. A land which belonged to several persons jointly, was apportioned among its sharers and they left a common way in it and made it an open way. Thereafter they built houses on the right and left of the way; with the doors of the houses towards the lane. Subsequently

الدور شارعة الي السكة فباع بعضهم دارا فالشفعة بينهم سواء وان قالو اجعلناها طريقا للمسلمين فكذلك الجواب ايضا قال الصدر الشهيد هوالمختار كذا في المحيط -

one of them sold his house, then the right of pre-emption belongs equally to all of them. And if they say "we have made it a way for the Muslims" then also the same effect follows. Sadrus Shahīd says that the same view is expressed in *Mukhtār*. This is according to the *Muḥīṭ*.

٤٨ - ولوان رجلا اشترى دارا في سكة غير نافذة ثم اشترى دارا اخرى في تلك السكة كان لاهل السكة ان يا خذ الاولى بالشفعة لان المشتري لم يكن شفيعا وقت الشراء الاول ثم صارهو شفيعا مع اهل السكة في الدار الثانية كذافي الظهيرية - دار بين ثلثة نفر فاشترى رجل نصيبهم واحداً بعد واحد فللجار ان يا خذ الثلث الاول وليس له على الثلثين الباقيين سبيل ولو كانت الدار بين اربعة نفر فاشترى رجل نصيب الثلثة واحداً بعد واحد

48. A person bought a house in a blind lane, thereafter he bought another house in the same lane. Then the people of the lane have the right to pre-empt the first house only, because the vendee was not its pre-emptor at the time of its sale but at the time of the second sale, he had become a pre-emptor along with the people of the lane. This is according to the *Zahiriyya*. A house belongs to three persons and a person buys their shares one after another. Then the *Shafi'-i-jār* is entitled to pre-empt the first one-third share and has no right to demand the next two-third shares. If a house belongs to four persons and a person buys the shares of the three sharers one after another while the fourth sharer is absent, thereafter the absentee appears, then he is entitled to pre-empt the share of the first sharer; and as regards the two

والرابع غائب ثم
حضر فله ان ياخذ
نصيب الاول وهو
في نصيب الاخرين
شريكه ولو اشتري
احد الاربعة
نصيب الاثنين
واحداً بعد واحد
ثم حضر الرابع كان
شريكا في النصيبين
جميعا كذا في
محيط السرخسي
و في الهاروني دار
بين ثلثة نفر اشتري
رجل نصيب احدهم
ثم جاء رجل آخر
اشتري نصيب آخر
ثم جاء الثالث
الذي لم يبع نصيبه
كان له ان ياخذ
النصيبين جميعا
بالشفعة فان لم
تحضر الثالث حتي
جاء المشتري الاول
الي المشتري الثاني
فطلب منه الشفعة
كان له ذلك ويقضي
له بها فيصير له
النصيبان جميعا فان
جاء الثالث بعد
ذلك وكان غائبا
وطلب الشفعة اخذ

other shares he would be a "partner-pre-emptor" along with the vendee.[1] If one of the four sharers buys the shares of two of them one after another, thereafter the fourth appears, then he would be a "partner-pre-emptor" in the two shares.[1] This is according to the *Muḥīṭ-of-Sarakhsī*. It is mentioned in the *Hārūni* that if a mansion is shared by three persons and a person purchases a share of one of them, and another person purchases the share of the next sharer; thereafter the third sharer who has not sold his share appears, then he is entitled to demand both the two shares in pre-emption but if the third sharer did not appear until the first vendee went to the second vendee and demanded pre-emption from him, then the first vendee is entitled to pre-emption and a decree would be given in his favour, and hence the second share would also pass into his ownership. Afterwards if the third absentee sharer appears and demands pre-emption, then he is entitled to pre-empt the first share which the vendee purchased first and half of the second share purchased next.[1] However, if

[1] That is, the absentee pre-emptor and the vendee are both equally entitled.

جميع ما اشتراه الاول
و نصف ما اشتراه
الثاني ولو لم يقض
القاضي للمشتري
الاول بما اشتراه
الثاني قضي للثالث
بالنصيبين جميعا
كذا في المحيط -
٤٩ - لرجل مسيل
ماء في دار بيعت
كانت له الشفعة
بالجوار لا بالشركة
وليس المسيل كالشرب
كذا في التاتار
خانية - واذا كان
نهر لرجل في ارض
لرجل عليه رحي
ماء في بيت فباع
صاحب النهر النهر
والرحي والبيت فطلب
صاحب الارض الشفعة
في ذلك كله فله
الشفعة وان كان بين
ارضه وبين موضع
الرحي ارض لرجل
وكان جانب النهر
الاخر لرجل آخر
فطلب الشفعة فلهما
ان ياخذا ذلك
بالشفعة لانهما
سواء في الجوار
الي النهر وان
كان بعضهم اقرب
الي الرحي كذا

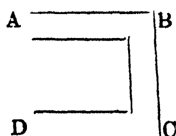
the third sharer appears and demands pre-emption at a time when the Kazi has not yet decreed pre-emption to the first vendee in the second sale, then a decree will be made in his favour entitling him to pre-empt the entire two shares. This is according to the *Muḥīṭ*.

49. A house has been sold and a person has *Haqq-i-Masīlulmā'* the right of passage for water across the property sold, then he is entitled to demand pre-emption in it by reason of neighbourhood (*Jawār*). The *Haqq-i-Masīlulmā'* does not resemble right of drawing water, *Shurb*. This is according to the *Tātār Khāniyya*. A person owns a stream of water which passes through the land of another person. On this stream there is a water mill. Now the owners of the stream and the mill-house have sold them, thereupon the owner of the land demands pre-emption in them all, he is entitled to do so. Similarly if between his land and the site of the mill, there is a plot belonging to another person and the other side (bank) of the river belongs to a different person, then they also are entitled to demand pre-emption, because they are in the neighbourhood of the stream, though it is possible that some one

في المسبوط - نهر
كبير كدجلة تجري
لقوم منه نهر صغير
فضارب شرب
اراضيهم من هذا
النهر الصغير فباع
رجل من اهل هذا
النهرالصغير ارضه
بشربها كان للذين
شربهم من هذا
النهر الصغير ان
ياخذوا تلك الارض
بالشفعة اقصاهم
وادناهم فيها سواء
فان كانت مع الارض
التي بيعت قطعة
اخرى لزيقة بهذه
الارض المبيعة وشرب
هذه القطعة من
النهر الكبير فلا
شفعة لصاحب القطعة
مع الذين شربهم
من النهر الصغير
في كتاب هلال
البصري في نهر ملتو
بيع فيه ارضون خلف
الالتواء اوقبله فان
كان الالتواء تبر بيع
فهو كنهرين فتكون

may be a nearer neighbour to the mill. This is according to the *Mabsūṭ*. If from a large stream like the Tigris, another small canal is branched out for a certain tribe and their lands are irrigated by this small canal, and then one of the members of the tribe on the small canal, sells his land with the right of *shurb*, the right of irrigating the land, then all those, who have the right of irrigation from this small canal are equally entitled to demand pre-emption, irrespective of the fact whether they are nearer or farther off from the land. And if another piece of land attached to the land sold is watered by the larger canal, then the owner of this piece of land is not entitled to demand pre-emption with those who have the right to irrigate their land from the small canal. In the book of *Hilālāl-Baṣrī* it is stated that on a *Nahr Multawī* (a canal having several turns) some lands situated on the turnings are sold now if the turnings of the stream could be considered as distinct canals,[1] then pre-emption would arise in

[1] *i.e.,*



AB,BC and CD will be considered as distinct canals.

الشفعة للشركاء في الشرب الي موضع الالتواء خاصة فان سلموا فهي للباقين من اهل النهر وان كان الالتواء باستدارة وانحراف كانت الشفعة لهم جميعا وجعلوه كالنهر الواحد في المنتقي بن سماعة عن محمد ؒ نهر بين قوم ولهم عليه ارضون والبساتين شربها من ذلك النهر وهم شركاء فيه فلهم الشفعة فيما بيع من هذه الاراضي والبساتين فان اتخذوا من تلك الارضين والبساتين دورا واستغنوا عن ذلك الماء فانه لاشفعة بينهم الا بالجوار بمنزلة دار الامصار وان بقي من هذه الارضين مايزرع وبقي من هذه البساتين مايحتاج الي السقي فهم شركاء في الشرب علي حالهم وشركاء في الشفعة كذا في المحيط -

favour of the persons living on that turning, and if they surrender their right, then it belongs to all people interested in the right of water. However if the turning is a mere curve or is circular then the right of pre-emption arises in favour of all persons, for the jurists consider it as a single canal. Ibn Samā'aḥ who receives the report from Imām Muḥammad mentions in the *Muntaqā* that a tribe owned a canal, where they had their lands and gardens irrigated by the canal. Since the members of the tribe are equal partners, so they all are pre-emptors in the property sold from amongst these lands and gardens. However, if they have turned their lands and gardens into houses and have nothing to do with the water of the canal, then they are entitled to pre-emption only by reason of neighbourhood as is the case as regards the houses situated in the city. But if there remain certain lands which are cultivated and certain gardens which are irrigated, then their owners respectively as stated above retain *inter se* the right of pre-emption. This is according to the *Muḥīṭ*.

٥٠- نهر فيه شوب لقوم وارض النهر لغيرهم فباع رجل ارضه والماء منقطع في النهر فلهم الشفعة في قول محمد رح وفي قياس قول ابي يوسف رح لاشفعة لهم بحق الشرب اذا كان الماء منقطعا كما في العلو المنهدم كذا في فتاوي قاضي خان -

50. A certain tribe has the right of water from a canal while the bed of the canal belongs to a certain other tribe. One of the members of this tribe sells his land at the time when the water of the canal is dried up, then according to Imām Muḥammad in this case also they all are entitled to pre-empt it, but applying *Qiyās* Abu Yusuf holds that they have no right by reason of right of water since the water of the canal is dried up, just as is the case with the owner of upper story of a house when it is destroyed. This is according to the *Fatāwā-i-Qāzī Khān*.

٥١ - واذا اشتري الرجل نهرا باصله ولرجل ارض في اعلاه الي جنبه ولرجل آخر ارض في سفله الي جنبه فلهما جميعا الشفعة في جميع النهر من اعلاه الي اسفله وكذا القناة والعين والبئر فهي من العقارات يستحق فيها الشفعة بالجوار وكذلك القناة يكون مفتحها في ارض

51. If a person purchases the whole area of a canal and two other persons own lands on the upper and lower sides on the banks of the canal then they both are equally entitled to demand pre-emption in the whole of the canal from the upper to the lower end of it. Similar is the case of *Qunnāt*, streams canals and wells. These are deemed as *'aqārs* whereupon pre-emption arises by reason of *Jawār* (neighbourhood). And similarly if a *Qunnāt*, stream, has its source in the land of one person while it flows and falls in the land of some other person; then all its neighbours

ويظهر ماؤها في
راض اخرى فجيرانها
من مفتحها الي
مصبها شركاء في
الشفعة واذا كان
نهر لرجل خالصا له
عليه ارض ولاخرين
عليه اراض ولاشرب
لهم فيه فباع رب
الارض النهر خاصة
فهم شركاء في
الشفعة فيه لا تصال
ملكهم بالمبيع وان
باع الارض خاصة
دون النهر فالملازق
للارض اولا هم
بالشفعة وان باع
النهر والارض جميعا
كانو اجميعا شفعاء
في النهر لا تصال
ملك كل واحد
منهم بالنهر وكان
الذي هو ملاصق
الارض اولا هم
بالشفعة في الارض
لاتصال ملكه بالارض
بمنزلة طريق في دار
لرجل فباع الطريق
والطريق خالص
له . فجار الطريق

from the source of the stream to its mouth are entitled to pre-emption. And when a canal belongs to a single person who has his lands there, while other lands situated there belong to some other person, who are not entitled to *shurb*, the right of water from this canal, subsequently the owner sells the canal, then also all who own lands situated on the canal are pre-emptors on account of neighbourhood, but if he sells the land only without the canal, then the *jār-i-mulāziq* of the land would be preferred to all; but if he sells the canal as well as the land, then they all are pre-emptors in the canal only on account of their properties being adjoined to the canal, while the *jar-i-mulāsiq* would be preferred in pre-empting the land to all on account of his property being adjacent to the land sold. This corresponds to the case of the way which lies through the enclosure of a certain person, and is his sole property, this way is sold, then here the neighbour of the way would be preferred to the neighbour of the land, and if he is a partner in the way also, then he would pre-empt the house, because a partner is preferred to *shafī'-i-jār* , and similarly if

اولى به من جار الارض و لو كان شريكا في الطريق اخذ شفعة من الدار لان الشريك مقدم علي الجار و كذلك ان كان شريكا في النهر اخذ بحصه من الارض و كان احق بها جميعا من جيران الارض والطريق والنهر سواء في كل شئي كذا في المبسوط -

he is a partner in the canal, then he would be entitled to pre-empt the land, and he has a preferential right as against all the neighbours. Hence as regards the way and the canal, the law is the same. This is according to the *Mabsūṭ*.

٥٢ - رجل له نصيب في نهر فهو احق بالشفعة ممن يجري النهر في ارضه كذا في فتاوي قاضي خان - و اذا كان نهر اعلاه لرجل واسفله لآخر و مجراه في ارض رجل آخر فاشترى رجل نصيب صاحب اعلي النهر فطلب صاحب الارض و صاحب السفل النهر الشفعة فالشفعة لهما جميعا بالجوار و كذلك لو اشترى رجل نصيب صاحب اسفل النهر فالشفعة لصاحب

52. If a person is a sharer in a certain canal then he is preferred to that person across whose land the canal flows. This is according to the *Fatāwā-ī-Qazī Khān*. When the upper side of a canal belongs to a certain person, and the lower side of it to another person and it flows across a third person's land, now if a stranger purchases the share of the owner of the upper side of the canal, thereafter the person through whose land the canal flows as well as the owner of the lower side of the canal demand pre-emption, then they both are equally entitled to pre-empt by reason of neighbourhood (*iawār*). And similarly if a stranger purchases the share of the person who owns the lower side of the canal then the right of pre-emption arises in

الاعلي بالجوار وكذلك لو كانت قناة مفتحها بين رجلين الي مكان معلوم واسفل من ذلك لا حدهما فباع صاحب الاسفل ذلك الاسفل فالشريك والجيران فيه سواء اذا كان نهر لرجل فطلب اليه رجل ليكري منه نهرا الي ارضه ثم بيع النهر الاول ومجراه في ارض رجل آخر فصاحب الارض اولي بالشفعة كذا في المبسوط -

favour of the owner of the upper side of the canal on account of *Jawār* (neighbourhood). And similarly if the source of a stream (*kunnat*), which is shared between two persons upto a definite place, while the rest of it belongs to one of them only, and he (the owner of the lower part) sells it, then the partner and the *shafī'-i-jār* have equal right of pre-emption in it. If a person owns a canal and some other person requests him to permit him to branch out a small canal from this canal to irrigate his land and the owner permitted him to do so, and a small canal was led from it to irrigate his land, thereafter the canal was sold, then as regards pre-emption the owner of the land is preferred. This is according to the *Mabsūṭ*.

٥٣ - وفي نوادر بن سماعة عن محمد دار في سكة خاصة باعها صاحبها من رجل بلا طريق فلا هل السكة الشفعة وكذلك لو باع ارضا بلا شرب فلا هل الشرب الشفعة ولو بيعت هذه الدار وهذه

53. In the *Nawādir* of Ibn Samā'ah, it is reported from Imām Muḥammad that in the case of a sale of a house situated in a private lane to a person without the way, the right of pre-emption belongs to all members of the lane. And similarly if a person sells a land without the right of *Shurb*, water, then the people interested in the right of water are entitled to pre-empt it. And if this house and the land were sold

الارض مرة اخرى
فليس لهم فيها
الشفعة هكذا في
الظهيرية قال محمد رح
في قراح واحد في
وسطه ساقية جارية
شرب هذا القراح
منها من الجانبين
فبيع القراح فجاء
شفيعان احدهما
يلي هذه الناحية
من القراح والاخر يلي
الجانب الاخر قال
هما شفيعان في القراح
وليست الساقية من
حقوق هذا القراح
فلا يعتبر فاصلا
كالحائط الممتد
ولو كانت هذه
الساقية بجوار
القراح ويشرب منها
الف جريب خارجا
من هذا القراح
فصاحب الساقية
احق بالشفعة من
الجار . كذا في
البدايع -

a second time, then they would not be entitled to demand pre-emption again.[1] This is according to the *Zahiriyya*. Imām Muḥammad says that if a field through which a small canal (*sāqiya*) passes irrigating the two sides, is sold, thereafter two pre-emptors appear one of whom has his property adjoined to one side of the canal and the other has his property adjoined to the other side, then they both are entitled to pre-empt the field. This canal is not an appendage of the field, and hence it cannot be considered as boundary line like a wall. If this canal is in the neighbourhood of the field and it is used for irrigation purposes about one thousand *jaribs* then the owner of the canal has a preferential right to that of *Shafi'-i-jār*. This is according to the *Badāyi*.'

[1] Because of their surrender of the right on the first sale, but the nearest neighbour by reason of neighbourhood would be entitled to pre-empt it.

الباب الثالث

في طلب الشفعة

٥٣ - الشفعة تجب بالعقد والجوار وتتأكد بالطلب والاشهاد ويتملك بالاخذ ثم الطلب على ثلثة انواع طلب مواثبة وطلب تقرير واشهاد وطلب تمليك اما طلب المواثبة فهو انه اذا علم الشفيع بالبيع ينبغي ان يطلب الشفعة على الفور وساعتئذ واذا سكت ولم يطلب بطلت شفعة وهذا رواية الاصل والمشهور من اصحابنا وروى هشام عن محمد ان طلب في مجلس العلم فله الشفعة والا فلا بمنزله خيار المخيرة وخيار القبول ثم اختلفوا في كيفية

CHAPTER III

The Demand of Pre-emption

54. The cause of the right pre-emption is sale and neighbourhood *jawār*, it is confirmed by *ṭalab*, and *Ish-hād*; and is perfected by taking possession. The demand is of three kinds:—*Ṭalab-i-Muwāsabat*, the immediate demand; *Ṭalab-Ish-had*, the demand with invocation, and *Ṭalab-i-Tamlik*, the demand of possession. By *Ṭalab-i-Muwāsabat* is meant that when a person entitled to pre-emption hears of a sale, he must claim his right immediately at the very instant, and if he remains silent without claiming the right, it will be extinguished. This is the accepted view of our jurists, and is according to the *Asl*. Hishām narrates another report from Imām Muḥammad that it is deemed sufficient compliance with the law if the demand is made at any time during the meeting at which the information is received, here the law is the same as in the case of *Khiyār-ul-Mukhyyira*[1] and *Khiyār-ul-Qubūl*.[2] The jurists differ as regards the expression in which the demand

[1] This has reference to *Tafwīz-ul-talāq* delegation of power of divorce to the wife.

[2] The right to propose and accept the contract of marriage.

لفظ الطلب والصحيح
انه لو طلب الشفعة
باى لفظ يفهم منه
طلب الشفعة جاز
حتى لو قال طلب
الشفعة واطلبها
وانا اطلبها جاز
ولو قال للمشتري
انا شفيعك وآخذ
الدار منك بالشفعة
بطلت واذا علم
الشفيع بالبيع فقال
الحمد لله وسبحان
الله والله اكبر
اوعطس صاحبه فشمته
او قال السلام عليك
وقد طلبت شفعتها
لا تبطل شفعة
وكذلك لو قال من
اشتراها وبكم اشتراها
اذا قال بالفارسية
(شفاعت خواهم)
بطل شفعة والطلب
في البيع الفاسد
يعتبر وقت انقطاع
حق البايع لا وقت
شرايه فاما في البيع
الفضولي او في
البيع بشرط الخيار
للبايع فعند ابي
يوسف رح يعتبر الطلب

should be expressed, and the correct view is that any words indicating a clear intention to pre-empt are sufficient, *e. g.*, if a person should say, "I demand pre-emption or I have demanded pre-emption or I demanded pre-emption;" then it is deemed lawful. But if he were to say to the vendee, I am thy pre-emptor, and I shall take this house in pre-emption, then such a demand is insufficient, the right of pre-emption would be extinguished. And if the pre-emptor when he is informed of the sale says 'God be praised' or 'Glory to God' or 'God is great' or if one of his companions sneezes, he says 'God bless you' or says 'Peace be on you' thereafter says "I demand pre-emption," then his right of pre-emption is not invalidated and similarly if he enquires as to who has purchased it and for what price, but if he says in Persian 'Shafa'āt' Khwāham,' then his right of pre-emption is invalidated. In the case of an invalid sale, the proper time for making the demand is not at the time of purchase, but when the sellers' right is entirely extinguished. As regards

[1] For the word *Shafā'at* is not the same as *Shuf'a*.

وقت البيع وعند محمد يعتبر وقت الاجازة وفي الهبة بشرط العوض روايتان في رواية يعتبر الطلب وقت القبض وفي رواية يعتبر وقت العقد ولو سمع الشريك والجار بيع الدار وهما في موضع واحد وطلب الشريك الشفعة وسكت الجار ثم ترك الشفيع الشفعة ليس للجار ان ياخذ الشفعة دار بيعت لها شفيعان واحد هما غائب وطلب الحاضر نصف الدار بالشفعة بطلت الشفعة وكذا لو كانا حاضرين وطلب كل واحد منهما الشفعة في النصف بطلت شفعتهما كذا في محيط السرخسي -

the sale *bai'-Fuzūlī* and the sale in which option is reserved by the vendor, Imâm Abu Yusuf says that the proper time to demand pre-emption is the time of sale, but Imām Muḥammad holds that it is at the time of the confirmation of the sale. And with regard to a *Hiba-bi-Shartil-'iwaz* gift with a condition for return, there are two reports (a) according to one view the time when mutual possession is interchanged should be taken into consideration (b) according to the other view the time of the gift is important, if a neighbour and a partner should hear of a sale at the same time, both being in one place, and the partner makes the demand, while the neighbour remains silent thereafter if the partner were to waive his right, then the neighbour would not be entitled to claim pre-emption at all. If a mansion is sold in which two persons have the right of pre-emption, and one of them is absent while the other is present, and the present pre-emptor claims half the mansion, then his right is annulled, so also if both were present and each were to claim pre-emption in half of the mansion, then their right would be annulled. This is so according to the ***Muḥīṭ-of Sarakhsī.***

٥٥ - ثم علمه بالبيع قد يحصل بسماعه بنفسه وقد يحصل باخبار غيره لكن هل يشترط فيه العدد والعدالة اختلف اصحابنا فيه قال ابو حنيفة رح يشترط احد هذين اما العدد في المخبر رجلان او رجل و امراتان واما العدالة وقال ابو يوسف ومحمد رح لا تشترط فيه العدالة ولا العدد حتي لو اخبره واحد بالشفعة عدلا كان المخبر او فاسقا حرا او عبدا ماذونا بالغا او صبيا ذكرا او انثي فسكت ولم يطلب علي فور الخبر علي رواية الاصل او لم يطلب في المجلس علي

55. Sometimes the pre-emptor himself receives the news of the sale by being present at the sale, and sometimes he is informed by another person. In the latter case, whether the number and trustworthiness of the informants are a necessary condition, as in the case of witnesses, is a disputed question among our jurists. Imām Abu Ḥanīfa says that it is an essential condition that there should be one or other of these conditions satisfied. That is, either the required number, two men, or one man and two women, or the trustworthiness of the informant is essential while according to Abu Yusuf and Muḥammad neither number nor trustworthiness is a necessary condition. So that if a person were to give information of the sale, and if the pre-emptor remains silent, then his right would be extinguished, of course provided the information proves to be correct and it is immaterial whether the informant is a trustworthy person or not or whether a *māzūn* slave, or whether adult person or a minor. Thus if the pre-emptor remains silent and expresses no opinion whether immediately as stated in the Asl or before the end of the meeting as required by Imām

روایة محمد رح بطلت
شفعة عندهما
اذا ظهر كون المخبر
صادقا وذكر الكرخي
ان هذا اصح
الروايتين كذا في
البدايع - و ان كان
المخبر رجلا واحدا
غير عدل ان صدقه
الشفيع في ذلك
ثبت البيع بخبره
بالاجماع وان كذبه
في ذلك لا يثبت
البيع بخبره وان
ظهر صدق المخبر
عند ابي حنيفة رح و
عندهما يثبت
البيع بخبره اذا
ظهر صدق المخبر
كذا في الذخيرة
٥٦ - واما طلب
الاشهاد فهو ان
يشهد على طلب
المواثبة حتى
يتاكد الوجوب با
لطلب على الفور
وليس الاشهاد شرطا
لصحة الطلب لكن
يتوثق حق الشفعة
اذا انكر المشتري
طلب الشفعة فيقول
له لم تطلب الشفعة
حين علمت بل
تركت الطلب وقمت

Muḥammad then according to the two disciples his right of pre-emption would thereby be extinguished. Karkhī has stated that out of the last two views the latter is the better view. This is according to the *Badāyi'*. Hence though the information is given by one untrustworthy person, yet if the pre-emptor believes him, then the sale is deemed to have taken place according to all jurists, but if he disbelieves the informant, the sale is not deemed to have taken place according to the Great Imām even though later on the information proves to be true, but according to the two disciples if the information proves to be true, the sale must be deemed to have taken place. This is according to the *Zakhīra.*

56. By *Ṭalab-i-Ishhād*, or demand with invocation of witnesses, is meant the calling of witnesses by the pre-emptor to attest the *Ṭalab-i-Muwāsabat* the immediate demand and his right of pre-emption is thereby strengthened. The invocation of witnesses is not required to give validity to the demand, but only to provide the pre-emptor with proof, should the vendee deny the demand, saying 'You did not demand your right, when you heard of the sale, nay,

عن المجلس و الشفيع يقول طلبت فالقول قول المشتري فلا بد من الاشهاد وقت الطلب توثيقا وانما يصح طلب الاشهاد بحضرة المشتري اوا لبايع او المبيع فيقول عند حضرة واحد منهم ان فلانا اشترى هذه الدار اودارا ويذكرحدود ها الاربعة و انا شفيعها وقد كنت طلبت الشفعة وانا اطلبها الآن فاشهدوا علي ذلك ثم طلب الاشهاد مقدر بالتمكن من الاشهاد فمتي تمكن من الاشهاد عند حضرة واحد من هذه الاشياء ولم يطلب الا شهاد بطلت شفعة نفيا للضرر عن المشتري فان ترك الاقريب من هذه الثلثة وذهب الي الا بعد ان كان الكل في مصر واحد لا تبطل شفعة استحسانا وان كان الا بعد في مصر

you abandoned your right, and rose from the meeting;' while on the other hand, the pre-emptor asserts 'I did demand' and since under the law the word of the vendee may be trusted, it is necessary to call on witnesses to attest the *Ṭalab-i-Ishhād* in order to give validity to the *Ṭalab-i-Muwāsabat.* Hence it is required that *Ṭalab-i-Ishhād* should be made in the presence of the vendee or vendor, or on the premises, the subject of sale. And the person claiming the right of pre-emption should say, in the presence of one or other of these, 'Such a person has purchased this mansion; or a mansion (specifying its boundaries), and I am its pre-emptor, and have demanded pre-emption, and now do demand it, bear you witness to this.' The validity of this demand is finally determined by the ability to do so. If a person is able to make the demand in the presence of one or other of these but does not do so, then the right of pre-emption is thereby extinguished with a view to prevent further injury to the vendee. If the pre-emptor leaves the nearest place and goes to the more remote (all being in the same city), even then according to the doctrine of *Istiḥsān*

آخر او في قريه
من قرى هذا
المصر بطلت شفعة
لان المصر الواحد
مع نواحيه واماكنه
جعل كمكان
واحد ولو كان الكل
في مكان حقيقة
وطلب من ابعد ها
وترك القرب جاز
فكذا هذا الا ان
يصل الي الا قرب
ويذ هب الي الا
بعد فحينئذ تبطل
وان كان المبيع لم
يقبض فهو بالخيار
ان شاء اشهد
علي طلبه عند
البايع والمبيع وان
كان المبيع في يد
المشتري ذ كر
الكرخي في النوادر
لا يصح الا شهاد
علي البائع ونص
محمد في الجامع
الكبيرانه يصح الا
شهاد عليه بعد
تسليم ا لمبيع
استحسانا لا قياسا
كذا في محيط
السرخسي -

the right of pre-emption is not annulled and similarly it is not annulled if the remote place be in another city or in one of the suburbs of the same city (the suburbs of a city are not considered as one single place). But if these places are actually in one city, and the demand is made at the most remote place thus abandoning the nearest, then it is still lawful; unless indeed the pre-emptor having arrived at the nearest place (does not demand pre-emption) subsequently goes to the most remote for in this case the right would obviously be annulled. If the vendee has not taken possession of the property sold, then the pre-emptor has the option, and may, if, he pleases, make the demand in the presence of the vendor or at the premises. But if the possession has been taken by the vendee, then according to *Karkhī* it is not valid to take witnesses and make the demand in the presence of the vendor. Imām Muḥammad, however, has expressly stated in the *Jāmi' Kabīr* that according to *Istiḥsān* (Equity) but not *qiyās*, analogy, it it lawful to do so even after the delivery of possession to the vendee. This is according to the *Muḥīṭ of Sarakhsī*.

٥٧ - وانما يحتاج الي طلب المواثبة ثم الي طلب الاشهاد بعده اذا لم يمكنه الا شهاد عند طلب المواثبه بان سمع الشراء حال غيبة عن المشتري والبايع والدار اما اذا سمع عند حضرة هؤلاء الثلث واشهد علي ذلك فذلك يكفيه ويقوم مقام الطلبين كذا في خزانة المفتين واما طلب التمليك فهو المرافعة لي قاضي ليقضى له بالشفعةولو ترك الخصومة ان كان بعذر نحو مرض اوجس او غيره ولم يمكنه التو كيل لم تبطل شفعة فان ترك من غير عذر لا تبطل شفعة عند ابي حنيفة رح وهو احدي الروايتين عن ابي يوسف رح كذا في محيط السرخسي -

57. The *Ṭalab-i-Muwāsabat* or immediate demand is first necessary, and if at the time of making the first demand there was no opportunity of invocation of witnesses, then the *Ṭalab-t-'Ishhād* or demand with invocation should be made, as for instance, the pre-emption was informed about the sale in the absence of the vendor, the vendee, and not at the premises, but if he heard it in the presence of any of these, and had called on witnesses to witness the demand, then it would suffice for both demands. This is according to the *Khīzāntul-Muftīn*. By the *Ṭalab-i-Tamlīk*, or the demand of possession, is meant the bringing of the matter before the *Kāzī* judge, so that he may decree the property to the claimant by reason of his right of pre-emption. If the pre-emptor neglects to litigate the matter for a sufficient reason, such as sickness, imprisonment, or the like, and cannot appoint an agent, the right of pre-emption is not annulled, and according to Abu Ḥanīfa, and one report of Abu Yusuf, even though he should neglect to do so without a sufficient reason, the right would not be annulled. This is according to the *Muḥīṭ*.

وهو ظاهر المذهب و عليه الفتوي كذا في الهداية - و عن محمد و زفر ؒ و هو رواية عن ابي يوسف ؒ ان اشهد وترك المخاصمة شهرا من غير عذر تبطل شفعته و الفتوي علي قولهما كذا في محيط السرخسي -

٥٨ - وصورة طلب التمليك ان يقول الشفيع للقاضي ان فلانا اشتري دارا وبين محلتها وحدودها وانا شفيعها بدار لي وبين حدودها فمره بتسليمها الي وبعد هذه الطلب ايضا لا يثبت الملك للشفيع في الدار المشفوعة الا بحكم القاضي او بتسليم المشتري الدار اليه حتى ان بعد هذا الطلب قبل حكم القاضي بالدار له وقبل تسليم المشتري الدار اليه لو بيعت دار اخرى بجنب هذه الدار ثم حكم له الحاكم

This is the approved doctrine of the *Hanafi* school, and the *Fatwā* is given according to it. This is according to the *Hidāya*. But according to Imām Muḥammad and Zufar, and by another report of Abu Yusuf also, if the pre-emptor were to call on witnesses to his demand, and yet should neglect to file a suit for a month[1] without a sufficient excuse, the right of pre-emption is annulled. This is according to the *Muḥīṭ*.

58. The proper form for making the *Ṭalab-i-Ṭamlīk* is for the pre-emptor to say before the Court *Kāzī* that such a person has purchased a mansion (describing its situation and boundaries), and I am its pre-emptor by reason of a house belonging to me (the boundaries of which he should also explain). Pray order him, therefore, to deliver the mansion to me. However simply by this demand, the mansion does not become his property unless the judge passes order for its delivery or until the vendee of his own accord delivers the property to the pre-emptor, so that if before either decree or delivery has taken place, another adjacent property is sold, and thereafter the judge passes his decree,

[1] According to Anglo-Muhammadan Law the period is one year. (Limitation Act 1908.)

او سلم المشتري الدار اليه لا يستحق الشفعة فيها وكذلك لو مات الشفيع او باع داره بعد الطلبين قبل حكم الحاكم او تسليم المشتري تبطل شفعة ذكر الخصاف ذلك في ادب القاضي وللشفيع ان يمتنع من الاخذ بالشفعة وان بذله المشتري حتى يقضي القاضي له بها كذا في المحيط- واذا رفع الامر الي القاضي فان القاضي لا يسمع دعواه الا بحضرة الخصم فان كانت الدار في يد البايع يشترط لسماع الدعوى حضرة البائع والمشترى لان الشفيع يطلب القضا بالملك واليد جميعا والملك للمشتري واليد للبايع فشرط حضرتهما وان كانت الدار في يد المشتري كفاه حضرة المشتري كذا في فتاوى قاضي خان - و اذا كان

or the property is delivered by the vendee, then the pre-emptor has no right of pre-emption in the property recently sold. In like manner, if the pre-emptor should die or sell his own house after making the demands, but before the order of the judge, or delivery of the property by the vendee to him then the right of pre-emption becomes extinguished. This is according to the *Adāb-ul-Kāzī*. The pre-emptor is entitled to refuse to take the mansion, though the vendee is willing to give its delivery, until the judge has decreed it in his favour. This is according to the *Muḥīṭ*. When the pre-emptor brings the suit demanding pre-emption, while the mansion is still in the possession of the vendor, then it is a condition to the hearing of the suit that both the vendor and the vendee should be present (as parties to the suit) because the pre-emptor is suing both for ownership and possession, the former being with the vendee and the latter with the vendor. But if the mansion is in the possession of the vendee, then his presence alone is sufficient for the hearing of the case. This is according to the *Fatāwā-i-Qāzī Khān*. If the pre-emptor is absent, then after he has received

الشفيع غائبا يوجل بعد العلم قدر مسيرة الطلب للاشهاد فان حضر هو اوو كيله والا ابطلت شفعته وان قدم وغاب واشهد علي الطلب فهو علي شفعته لان عند ابي حنيفه بتاخير طلب التمليك لا تبطل شفعته وعند هما تبطل الا بعذر وههنا ترك طلب التمليك بعذر فان ظهر المشتري في بلد ليس فيه الدار لم يكن علي الشفيع الطلب هناك وانما يطلب حيث الدار كذا في محيط السرخسي - الشفيع اذا علم بالشراء وهو في طريق مكة فطلب طلب المواثبة وعجز عن طلب الاشهاد بنفسه يوكل وكيلا ليطلب له الشفعة فان لم يفعل ومضى بطلت شفعة وان لم يجد من يوكله فوجد

the information of sale he would be allowed a sufficient time to make the demands and if he and his agent appears within a reasonable time, so much the better, otherwise his right of pre-emption would be annulled. And if he appears and goes away after making *Ṭalab-i-Ish hād* his right continues according to Abu Ḥanīfa because by delaying *Ṭalab-i-Tamlīk* the right of pre-emption is not annulled; but according to his two disciples the right of pre-emption would be annulled if there is no sufficient cause for delay. And if the vendee happens to be in a certain city while the property sold is in another town, then the pre-emptor is not obliged to make his demand there, but he should make his demand at the place where the property is situated. This view is exp essed in the *Muḥīṭ of Sarakhsī.* If the pre-emptor hears of a sale while en route to Mecca, and there he makes *Ṭalab-i-Muwāsabat* but is unable to make *Ṭalab-i-'Ish hād* personally, then he should appoint an agent (vakil) to make this demand on his behalf, but if he does not do so, and continues his journey, his right of pre-emption is annulled. And if he does not find any one whom he could appoint his agent,

فيجا يكتب علي
يديه كتابا ويوكل
وكيلا في الكتاب
فان لم يفعل بطلت
شفعته وان لم يجد
وكيلا ولا فيجا
لا تبطل شفعته حتي
يجد الفيج كذا
في الظهيرية—رجل له
شفعته عند القاضي
يقدمه الي السلطان
الذي تولي القضاء
منه وان كانت
شفعته عند السلطان
فامتنع القاضي من
احضاره فهو علي
شفعة لان هذا
عذر كذا محيط
السرخسي -

but finds a person (*fija*, a scribe or messenger), then he should have a letter sent through him appointing an agent and if he does not do so, his right of pre-emption would be invalidated, but if he neither finds an agent nor a scribe, nor a messenger then his right of pre-emption continues until he finds one of them. This is according to the *Zahiriyyah.* If a person has a right of pre-emption against a *Kāzī* judge, then he should present the judge before the Sultan who has appointed him and if he has a right of pre-emption against the Sultan and the *Kāzī* judge refuses to summon the Sultan, then his right of pre-emption continues, because there exists a sufficient excuse. This is according to the ***Muḥīṭ*** of ***Sarakhsī.***

٥٩ - الشفيع اذا
علم في الليل
ولم يقدر علي
الخروج والا شهاد
فان اشهد حين
اصبح صح كذا
في الخلاصة—قال ابن
الفضل اذا كان
وقت خروج الناس
الي حوائجهم يخرج
ويطلب كذا في
الحاوي - الفتاوي

59. If the pre-emptor is informed of sale at such a time in the night that he cannot go out to demand *Ṭalab-i-Ishhād*, thereafter if he makes the demand early in the morning as soon as the sun rises it would be valid. This is according to the *Khulāṣa.* If he receives the information at such a time that people usually go out to do their work, then he must proceed to make the demand. This is the view of Ibn Fazl

اليهودي اذا سمع
البيع يوم السبت
فلم يطلب بطلت
شفعته كذا في
خزانة المفتين -
شفيع بالجوار
اذا خاف انه لو
طلب الشفعة عند
القاضي والقاضي لا
يري الشفعةبالجوار
تبطل شفعته فلم
يطلبه فهو علي
شفعته لانه ترك بعذر
كذا في محيط
السرخسي -

and is according to the *Ḥāwī*. According to the *Fatāwā*, if a Jew receives information of sale on a Saturday, and he does not make the demand, then his right of pre-emption is annulled. This is according to the *Khizānat-ul-Muftīn*. If the *Shafī-i-Jār* is afraid of demanding pre-emption before a *Kāzī* of the *Shāfi'* school who does not decree *Shufa'-bil-Jawār*, therefore he does not demand pre-emption, his right is not annulled because he has done so on account of a proper excuse. This is according to the *Muḥīṭ* of *Sarakhsī*.

٦٠ - اذا اشتري
رجل من اهل
البغي ١٥دارا من
رجل في عسكره
والشفيع في عسكر
اهل العدل فان
كان لا يقدر علي
ان يبعث وكيلا
ولا ان يدخل بنفسه
عسكرهم فهو علي
شفعته ولا يضره ترك
طلب الاشهاد
وان كان يقدر علي
ان يبعث وكيلا
او يدخل بنفسه
عسكرهم فلم يطلب
طلب الاشهاد
بطلت شفعة كذا
في المحيط -

60 When an *Ahl-i-Baghy*, one of the rebels, purchases a house from a person in the rebel's army while its pre-emptor is in the army of *Ahl Ḥaq*, the just people, and if he (the pre-emptor) is unable to send an agent or he himself is unable to enter the rebel force, then his right of pre-emption continues, and the delay in execution of the *Ṭalab-i-Ishhād* is of no consequence ; but if it were possible for him to send an agent or to enter the force himself and then he did not make the demand, then his right of pre-emption would be annulled. This is according to the *Muḥīṭ*. If the pre-emptor happens to be in the

الشفيع اذا كان في عسكر الخوارج او اهل البغي وخاف علي نفسه لودخل في عسكر اهل العدل فلم يطلب الاشهاد بطلت شفعته لانه قادر بان يترك البغي فيدخل عسكر اهل العدل كذا في محيط السرخسي-

٦١ - اذا اتفق البائع والمشتري ان الشفيع علم بالشراء منذ ايام ثم اختلفا بعد ذلك في الطلب فقال الشفيع طلبت منذ علمت وقال المشتري ماطلبت فالقول قول المشتري وعلي الشفيع البينة ولو قال الشفيع علمت الساعة وانا طلبها وقال المشتري علمت قبل ذالك ولم تطلب فالقول قول الشفيع وحكي عن الشيخ الامام الزاهد عبد الواحد الشيباني انه قال اذا كان الشفيع علم بالشراء وطلب طلب المواثبة ثبت

force of *Khawārj* deserter or that of *Ahl-Baghy* rebels and is afraid to enter the army of *Ahl'Adl*, the just people, and hence he does not make the demand of *Ṭalab-i-'Ishhād*, then his right of pre-emption is annulled, for it was possible for him to leave the enemy and enter the army of *Ahl'Adl*. This is according to the *Muḥīṭ* of *Sarakhsī*.

61. If the vendor and the vendee agree that the pre-emptor some time ago received the information of sale but afterwards they disagree as to the making of *Ṭalab* and the pre-emptor says, "I demanded pre-emption when I heard of the sale," while the vendee denies this statement, then the word of the vendee will be accepted and the pre-emptor will have to tender evidence. However if the pre-emptor says "I am informed of the sale just now, and I demand it," then the vendee says 'You heard of the sale long before, and you did not demand,' then the word of the pre-emptor will be accepted and the vendee will have to tender evidence. It is reported from Imām 'Abdul Wāḥid Shaibānī that if a pre-emptor is informed of the sale, and he has made

حقه لكن اذا قال بعد ذلك علمت منذ كذا وطلبت لا يصدق علي الطلب ولو قال ماعلمت الا الساعة يكون كاذبا فالحيلة في ذلك ان يقول لانسان اخبر ني بالشراء ثم يقول الآن اخبرت يكون صادقا وان كان اخبر ذلك وذكر محمد بن مقاتل في نوادره اذا كان الشفيع قد طلب الشفعة من المشتري في الوقت المتقدم و يخشي انه لو اقر بذلك يحتاج الي البينة فقال الساعة علمت وانا اطلب الشفعة يسعه ان يقول ذلك ويحلف علي ذلك وليستثني في يمينه كذا في المحيط - فان قال المشتري للقاضي حلفه بالله لقد طلب هذه الشفعة طلبا صحيحا ساعة علم بالشراء من غير تاخير فحلف القاضي، علي ذلك فان اقام المشتري بينة ان الشفيع

Ṭalab-i-Muwāsabat then his right is established, but if he says that after he was informed of the sale on a particular day he demanded pre-emption, then his statement need not be accepted and if he says that he heard of it only now, then he would be considered a liar for this may be a device which may be effected thus; the pre-emptor may ask some one to inform him of the sale at that time, and thereupon he makes the statement that he heard about the sale just now, and he would obviously be speaking the truth for he actually received the information at that time. In the *Nawādir* Muḥammad Bin Muqātil mentions that when the pre-emptor has demanded pre-emption from the vendee some time before and is afraid that if he assert it he would have to call witnesses for it, and accordingly says that he is informed of it just now and he demands pre-emption then he may be allowed to say so on oath. This is according to the *Muḥīṭ*. The *Kāzī* may ask the vendee to demand an oath from the pre-emptor on the fact that he has demanded pre-emption by a valid demand without delay, the moment he received the information of sale. If the vendee produces proof to the effect that the pre-

علم بالبيع منذ زمان ولم يطلب الشفعة واقام الشفيع البينة انه طلب الشفعة حين علم بالبيع في البينة بنية الشفيع والقاضي يقضي بالشفعته في قول ابي حنيفة رح وقال ابو يوسف رح البينة بنية المشتري كذا في الذخيرة - المشتري اذا انكر طلب الشفيع الشفعة عند سماع البيع يحلف علي العلم وان انكر طلبه عند لقائه حلف علي البتات كذا في الملتقط -

emptor received the information of sale a long time ago and he did not demand pre-emption, while the pre-emptor also produces evidence that he did demand pre-emption when he received the information of sale, then the evidence of the pre-emptor would be relied upon, and the *Kāzī* would decree *Shufa'* to him. This is so according to Imām Abu Ḥanīfa, but his two disciples hold that the evidence of the vendee should be credited. This is according to the *Zakhīra*. If the vendee denies that the pre-emptor demanded pre-emption at the time of information of sale, then the vendee would be sworn as to the fact of information only, but if he denies that the pre-emptor demanded pre-emption when he met him then he would be sworn absolutely. This is according to the *Multaqit*.

٦٢ - اذا تقدم الشفيع وادعي الشراء وطلب الشفعة عند القاضي يسال القاضي اولا المدعي قبل ان يقبل علي المدعي عليه عن موضع الدار من مصر و محلة وحدودها لانه ادعي فيها حقا فلا بد ان تكون معلومة لان

62. When the pre-emptor brings a suit of pre-emption, the *Kāzī* judge, before accepting or admitting the suit against the defendant should ask him first respecting the town and street, and where the property is situated, and also its boundaries, for the pre-emptor is seeking to establish a right and it is necessary that the property should be definitely ascertained because a defec-

دعوي المجهول
لاتصح فصار كما
اذا ادعى ملك
رقبتها فاذا بين
ذلك سأله هل
قبض المشتري الدار
ام لالانه اذا لم
يقبضبها لاتصح
دعواه علي المشتري
حتى يحضر البائع
فاذا بين ذلك
ساله عن سبب
شفعة وحدود مايشفع
بها لان الناس
مختلفون فيه فلعله
ادعاه بسبب غير
صالح او يكون هو
محجوبا بغيره فاذا
بين سببا صالحا
ولم يكن محجوبا
بغيره ساله انه متى
علم وكيف صنع
حين علم لا نها
تبطل بطول الزمان
وبالا عراض وبما
يدل عليه فلا بد
من كشف ذلك
فاذا بين ذلك
سأله عن طلب التقرير
كيف كان وعند
من اشهد وهل
كان الذي سال
عنده اقرب من
غيره ام لا علي
الوجه الذي بيّنا

tive suit is invalid. When this has been explained, the *Kazi* should ask him whether the vendee has taken possession of the property or not; for if the vendee has not taken possession, the suit is not valid unless the seller is also made a party to the suit; the *Kazi* should also enquire from the pre-emptor the cause of his right of pre-emption, that is the boundaries of the property by reason of which he claims his right, for there are different causes and he may perhaps be basing this claim on an interior cause that is he may be excluded by another person who has the superior right. After the pre-emptor has assigned a proper cause, and is not excluded by any other person, then the judge should ask him when he became acquainted with the fact of the sale, and how he acted on the occasion; for the right of pre-emption may be annulled by lapse of time, or by some other objection, therefore all this should be enquired. Thereafter the *Kazi* should ask him about the *Ṭalab-i-taqrīr*, or confirmatory demand, how it was, and before whom and where he made the demand at the nearest or the remote place. After all this has been explained, in a satisfactory manner the claim is complete as against the defend-

فاذا بيّن ذلك
كله ولم يخل من
شروطه تم دعواه
واقبل علي المدعى
عليه وساله عن
الدار التي يشفع
بها هل هي ملك
الشفيع ام لا وان
كانت هي في يد
الشفيع وهي تدل
علي الملك ظاهرا
لان الظاهر لا يصلح
للا ستحقاق فلا
بد من ثبوت ملكه
بحجة لاستحقاق
الشفعة فيسال له
عنه فان انكران
يكون ملكا يقول
للمدعي اقم البنية
انها ملكك فان عجز
عن البنية و طلب
يمينه استحلف
المشتري بالله ماتعلم
انه مالك للذّي
ذكره مما يشفع به لانه
ادعي عليه حقا لو اقربه
لزمه ثم هو في يد
غيره فيحلف علي
العلم وهذا عند
ابي يوسف ؒ كذا
في التبيين – و عليه
الفتوى كذا في
السراجية –فان نكل
او قامت للشفيع
بنية او اقر المشتري

ant, who should now be interrogated respecting the property by reason of which the claim has been made. 'Is it the property of the pre-emptor or not?' for even though it were in his possession which is apparent evidence of ownership it is not sufficient for the claim of pre-emption must be established by direct proof. The defendant is accordingly to be asked regarding it, and if he denies the property to belong to the pre-emptor, the judge should say to the plaintiff, 'Produce proof that it is your property and if he (the plaintiff) fails to do so, and demands an oath from the vendee, the oath is to put in these words, 'By God I do not know that he is the proprietor of this house by reason of which he demands pre-emption.' The vendee is to swear on his knowledge of the fact because it is possible the property of the pre-emptor may be actually in some one else's possession. According to the *Tabayīn* this is the view of Imām Abu Yusuf and according to the *Sirajiyya* the *Fatwa* accords with this view. However, if the vendee refuses to take the oath or the pre-emptor produces evidence or the vendee himself admits the fact then the pre-emptor's right to pre-empt

بذلك ثبت ملك الشفيع في الدار التي يشفع بها ويثيت السبب وبعد ذلك بسائل القاضي المدعي عليه فيقول هل اشتريت ام لا فان انكر الشراء قال للشفيع اقم البنية انه اشترى فان عجز عن اقامة النية وطلب يمين المشتري استحلف بالله ماشتري او بالله مايستحق عليه في هذه الدار شفعة من الوجه الذي ذكره فهذا تحليف علي الحاصل وهو قول ابي حنيفة ومحمد والاول علي السبب وهو قول ابي يوسف فان نكل او اقر او قامت للشفيع بنية قضي بها لظهور الحق بالحجة كذا في التبيين - وفي الاجناس بين كيفية الشهادة فقال ينبغي ان يشهدوا ان هذا الدار التي بجوار الدار المبيعة ملك هذا الشفيع قبل ان يشتري

the property is fully established. Thereafter the *Kazi* is to ask the vendee "Have you purchased the property or not." If he denies the purchase, the judge should ask the pre-emptor to produce proof of the fact of the sale, and if he is unable to do so and demands the oath from the vendee, the oath should be administered in these words, 'By God I have not purchased,' or 'By God, he has no right of pre-emption against me in this mansion.' This would be putting the oath as to the result, in conformity with the opinion of Imām Abu Ḥanīfa and Muḥammad while the other mode is to put it as to the cause, which is in accordance with the opinion of Abu Yusuf. If the vendee refuses to take the oath or he acknowledges the sale, or the pre-emptor adduces proof, then the decree is to be given in favour of the pre-emptor the right having been established by manifest proof. This is according to the *Tabyīn*. The *'Ajnās* mentions the mode in which the evidence is to be taken. The witnesses should depose in the following manner. As regards the fact, of the pre-emptor's neighbourhood of the purchased mansion, it is required that the witness should testify thus, 'This property which is in

هذا المشتري هذه الدار وهي له الى هذه الساعة لا نعلمها خرجت من ملكه فلو قالا ان هذه الدار لهذا الجار لا يكفي ولو شهدا ان الشفيع اشترى هذه الدار من فلان وهي في يده او وهبها منه فذلك يكفي فلو اراد الشفيع ان يحلف المشتري فله ذلك كذا في الذخيرة والمحيط-

the vicinity of the purchased mansion, has been the property of the pre-emptor before the vendee had purchased that mansion, and that it belongs to him upto this time: and we do not know whether it has gone out of his ownership.' Hence if they should depose simply, 'This property belongs to this neighbour,' it would not be sufficient but if they should say that 'The pre-emptor bought this property from such and such person, and it is in his possession,' or that 'Such person gifted it to him' this testimony would be deemed sufficient. If the pre-emptor intends to demand an oath from the vendee, he can do so. This is according to the *Zakhīra* and the *Muhīt*.

٦٣ - عن ابي يوسف لو ادعى رجل دار او اقام بنية من هذه الدار كانت في يد ابيه مات وهي في يده فانه يقضي له بالدار ولو بيعت دار بجنبها فانه لا يستحق الشفعة حتى يقيم البنية على الملك دار في يد رجل اقر انها لاخر فبيعت

63. It is reported from Abu Yusuf that if a certain person brings a suit for a house and establishes by proof that 'This house was in the possession of his father,' and that it remained in his possession till his death, then the *Kāzī* should decree the house to him; meanwhile if a mansion by the side of this house is sold, then he is not entitled to pre-empt it prior to his establishing ownership in the house by reason of which he could demand pre-emption. A

بجنبها دار فطلب
المقر له الشفعة
فلا شفعة له
حتى يقيم البنية
ان الدار داره
كذا في محيط
السرخسي - وذكر
الخصاف في اسقاط
الشفعة ان البايع
اذا اقر بسهم
من الدار المشتراة
ثم باع منه بقية الدار
فالجار لا يستحق
الشفعة وكان ابو بكر
الخوارزمي يخطي
الخصاف في هذه
ويفتي بوجوب
الشفعة للجار لان
الشركة ماثبتت الا
باقراره كذا في
الذخيرة - رجلان
ورثا عن ابيهما
اجمة واحد الوارثين
بعينه لم يعلم
بالميراث ولم يعلم
بان له منها نصيباً
فبيعت اجمة اخرى
بجوار هذه الا
جمة فلم يطلب
هو الشفعة فلما

house is in the possession of a person who acknowledges that it belongs to certain other person, and if a house beside this house is sold, and the person for whom the acknowledgment was made, demands pre-emption in the house, then he would not be entitled to do so until he produces proof that the house by reason of which he demands pre-emption is actually his own property. This is according to the *Muḥīṭ* of *Sarakhsī*. As regards the extinction of the right of pre-emption Khisāf mentions that if a vendor acknowledges a certain share in the house for a person, thereafter sells the remainder of the house to him, then the neighbour is not entitled to pre-emption; but Abu Bakr Khwārazmī disapproves, of this view of Khisāf and gives *Fatwa* to the effect that pre-emption arises in favour of the neighbour, *Shafī'-i-jār*, for there is no other proof of partnership except the acknowledgment of the vendor. This is according to the *Zakhīra*. If two heirs inherit *Ajmah* (a forest) from their father, while one of them is not aware of the fact, that his father left him this forest and also has no knowledge that he has a share in it; and in the meanwhile

علم ان له فيها
نصيبا طلب الشفعة
في الا جمة المبيعة
قالو اتبطل شفعة
لان شرط تاكد
الشفعةطلبالمواثبة
عند العلم بالبيع
فاذا لم يطلب
والجهل ليس بعذر
لا تبقى له الشفعة
كذا في فتاوى
قاضي خان –

another forest beside this forest is sold, and he does not demand pre-emption in it, afterwards he learns that he has a share in that forest by reason of which he could demand pre-emption, therefore now he demands pre-emption in the forest sold, then according to the jurists his right of pre-emption has already been invalidated inasmuch as that the essential condition for establishing pre-emption is that *Ṭalab-i-Muwāsabat* should be made at the time of the information of sale, and he has not made that demand and further since such ignorance is not a sufficient excuse, the right cannot exist. This is according to the *Fatāwā-ī-Qāzī Khān*.

الباب الرابع

في استحقاق الشفيع كل المشتري اولبعضه

٦٤ - رجل اشترى خمس منازل من رجل واحد في سكة غيرنا فذة بصفقة فاراد الشفيع ان ياخذ منزلا واحدا قالوا ان طلب الشفعة بحكم الشركة في الطريق لا ياخذ البعض لانه تفريق الصفقة من غير ضرورة وان اراد الشفعة بحكم الجوار وجواره في هذا المنزل الذي يريد اخذه لا غير كان له ذلك كذا في فتاوى قاضي خان - اذا اراد الشفيع ان ياخذ بعض المشترى دون بعض فان لم يكن ممتازا عن البعض بان اشترى دارا واحدة فاراد الشفيع ان ياخذ بعضها بالشفعة دون البعض وان ياخذ الجانب

CHAPTER IV

Of the Pre-emptor's Right to the Whole or a Part of the Purchased Property

64. When a person purchases from another person, by a single bargain, five houses in a street in which there is no thoroughfare, and the pre-emptor desires to take one of them, then according to our jurists if his right of pre-emption is based on partnership in the way, he cannot pre-empt one of them for this would amount to the division of the bargain without any necessity for it, but if his right is based on neighbourhood, that is he happens to be the neighbour only to the house which he wishes to pre-empt, then he would be lawfully entitled to pre-empt it alone. This is according to the *Fatāwā-i-Qāzī Khān.* If a pre-emptor wishes to take a part of a purchased property and not the whole, while that part is not distinct or separate, as for instance, when the purchased property is a single mansion, and the pre-emptor desires to take that part which abuts on his own

الذي يلي الدار دون الباقي ليس له ذلك بلا خلاف بين اصحابنا ولكن باخذ الكل او يدع لانه لو اخذ البعض دون البعض تفرقت الصفقة علي المشتري سواء اشتري واحد من واحد او واحد من اثنين او اكثر حتي لو اراد الشفيع ان ياخذ نصيب احد البائعين ليس له ذلك سواء كان المشتري قبض او لم يقبض في ظاهر الرواية عن اصحابنا وهو الصحيح ولو اشتري رجلان من رجل دارا فللشفيع ان ياخذ نصيب احد المشتر يين في قولهم جميعا سواء كان قبل القبض او بعده في ظاهر الرواية لان الصفقة حصلت متفرقة من الابتداء فلا يكون اخذ البعض تفريقا وسواء سمي لكل واحد نصف ثمن علي حدة او سمي للجملة ثمنا واحدا وسواء كان

premises, without the remainder, then he cannot do so, and on this point there is no difference of opinion among our jurists; for if he were allowed to take a part only, that would be a division of the bargain as against the purchaser. The pre-emptor therefore must either pre-empt or leave the whole, whether the purchase be by one person from a single vendor or by a single vendee from two or more vendors; hence he cannot pre-empt the share of one of the two sellers and it is immaterial whether the purchaser has or has not taken possession of the property sold. This is the correct view. This is according to the *Zahir Riwāyat*. However if two vendees purchase some property from one vendor, the pre-emptor may take the share of one of them. This is the view according to all jurists, irrespective of the fact whether the purchasers have taken or have not taken possession of the property. This is according to the *Zahir Riwāyat* for here the bargain was separate from the beginning and the pre-emption of a distinct part is not dividing the bargain; and it is immaterial whether half the price was mentioned separately for each property or a single sale consideration was mentioned for both, or whether the person

المشتري عاقدا
لنفسه اولغيره في
الفصلين حتي لو
وكل رجلان جميعا
واحدا بالشراء
فاشتري الوكيل من
رجلين فجاء الشفيع
ليس له ان ياخذ
نصيب احد البايعين
بالشفعة ولو وكل
رجل رجلين فاشتريا
من واحد فللشفيع
ان ياخذ مااشتراه
احد الوكيلين
وكذا لو كان الوكلاء
عشرة اشتروا الرجل
وحد فللشفيع ان
ياخذ من واحد او من
اثنين او من ثلثة قال
محمد رح وانما انظر
في هذا الي المشتري
ولا انظر الي المشتري
له وهو نظر صحيح
وان كان المشتري
بعضه ممتاز اعن
البعض بان اشتري
دارين صفقة واحدة
فاراد الشفيع ان ياخذ
احدا فيهما دون الا
خري فان كان
شفيعا لهما جميعا
فليس له ذلك
ولكن ياخذهما
جميعا او يدعهما
وهذا قول اصحا
بنا الثلثة سواء

had contracted for himself or not. If two persons together were to appoint one person as an agent to purchase some property and the agent accordingly purchases from two persons, and the pre-emptor desires to make his claim, then he cannot take the share of one of the vendors only by his right of pre-emption; but if one person appoints two agents and these two agents purchase from one vendor then the pre-emptor may pre-empt the sale effected by one of the agents only. So also if ten agents purchase from one person, the pre-emptor may take from one, or from two, or from three. Imām Muḥammad has said that in all these cases regard is to be had to the actual purchaser, and not to the person on whose account the purchase has been made; and this is the correct view. If a part of the purchased property is separate and distinct from other part of it, as for instance, when two mansions are purchased by one bargain, the pre-emptor cannot take one of them without the other when he is entitled to pre-empt the both. Hence he must either take or leave the both; and this is the view of our three eminent jurists. It is immaterial whether the mansions are adjacent or separated

كانت الداران
متلاصقتين او
متفرقتين في مصر
واحدا وفى مصرين
وان كان الشفيع شفيعا
لاحد اهما دون
الاخرى ووقع البيع
صفقة واحدة فهل
له ان يا خذالكل
بالشفعة روى عن
ابي حنيفة ؒ انه
ليس له ان ياخذ
الا الشئي الذى
يجاوره بالحصة و
كذاروي عن محمد ؒ
في الدارين
المتلاصقتين اذا كان
الشفيع جاراًلاحداهما
انه ليس له الشفعة الا
فيما يليه وكذا قال
محمد ؒ فى
الاقرحته المتلا صقة
وواحد منها يلى
ارض انسان وليس
بين الا قرحة
طريق ولا نهر الا
مسناة انه لاشفعة
له الا فى القراح
الذي يليه خاصية
وكذ لك في قرية اذا
بيعت بدورها و
اراضيها ان لكل
شفيع ان ياخذ
القراح الذي
يليه خاصة وروي

from each other, and whether they are situated in one or two different cities; but if, he were the pre-emptor of one of the mansions only then according to Imām Abu Ḥanīfa he cannot pre-empt both, but that one only of which he is the actual *Shafī'-i-jār*. And the same is the view of Imām Muḥammad also. As regards several fields which are adjacent to one another, and a certain piece of land belonging to different owner is adjacent to one of them and there is no common way or a canal in these fields except one *musnat* (a branched out small canal), then according to Imām Muḥammad the neighbour is entitled to pre-empt that field alone which is adjacent to his land. Similarly, in the case of villages if a certain village with all its effects (houses and fields) is sold, then a pre-emptor may pre-empt that field which is adjacent to his own and Hasan bin Ziyād has reported from Imām Abu Ḥanīfa that the pre-emptor is entitled to pre-empt the whole; but Shaikh Kurkhī says that it can be inferred from the report of Hasan bin Ziyad that Imām Abu Ḥanīfa was also of the same opinion as Muḥammad but afterwards he held that the whole should

الحسن عن ابي حنيفه ؒ ان للشفيع ان ياخذا لكل في ذلك كله بالشفعة قال الكرخي روايه الحسن تدل على ان قول ابي حنيفه ؒ كان مثل قول محمد ؒ ثم رجع عن ذالك فجعل كالدار الواحدة هكذا في البدايع –

be treated as one mansion. This is according to the *Badāyiʿ*.

الباب الخامس

في الحكم بالشفعة والخصومة فيها

٦٥ - ولا يلزم الشفيع احضار الثمن وقت الدعوى بل يجوزله المنازعة وان لم يحضر الثمن الى مجلس القاضي فاذا قضى له بالشفعة له احضار الثمن وهذه رواية الاصل وعن محمد رح ان القاضي لايقضى له بالشفعة حتى يحضر الثمن ثم اذا قضى له قبل احضار الثمن فللمشتري حق حبس العقار عنه حتى يدفع الثمن اليه وينفذ القضاء عند محمد رح لانه فصل مجتهد فيه ولو اخر دفع الثمن بعد ماقال ادفع الثمن اليه لا تبطل بالاجماع كذا في التبيين - فان اخذ الدار من المشتري فعهدته وضمان ماله علي المشتري وان اخذها من البائع

CHAPTER V

Of Institution of the Pre-emptor's Claim and Its Effects

65. It is not incumbent on the pre-emptor to tender the price at the time of making his claim. Nay, he may lawfully contest the matter before the *Kāzī* without tendering the sale-consideration. But after the decree has been given, he must pay the amount. This is according to the *Asl.* Imām Muḥammad says that the *Kāzī* should not decree pre-emption to him unless he has tendered price, and if he has given the decree prior to the tender of the price, the vendee is entitled to refuse delivery of the property until the price is paid to him, and according to Imam Muhammad this view is subject to the order of the *Kāzī.* However, if the pre-emptor were to delay payment after he has been directed to do so, then according to all jurists, the decree is not to be cancelled. This is according to the *Tabyīn.* If the pre-emptor takes the property from the vendee, then the contract and security of the sale-consideration rests upon vendee. And if he takes it from the vendor, then the contract and

و دفع الثمن اليه
فعهدته وضمان ماله
علي البائع عندنا و
روى ابوسليمان عن
ابي يوسف رح ان
المشتري كان نقد
الثمن ولم يقبض
الدار حتي قضي
القاضي للشفيع
بحضرتهما فانه
يقبض الدار من
البايع وينقد الثمن
للمشتري وعهدته
علي المشتري وان
كان لم ينقد الثمن
دفع الشفيع الثمن
الي البايع وعهدته
علي البايع
فلوان الشفيع
في هذه الصورة
وجد بالدار عيبا
فردها علي البايع
اوعلي المشتري
بقضاء القاضي
فان اراد المشتري
ان ياخذها
بشرايه واراد
البائع ان يردها
علي المشتري
بحكم ذلك الشراء
فالمشتري بالخيار
ان شاء اخذها وان
شاء تركها فان اخذ
الشفيع الدار من
المشتري واراد ان

its responsibilities are on the vendor. Abu Sulaimān reports from Abu Yusuf that if the vendee has paid the price and has not yet obtained possession of the property and the Kazi decrees pre-emption in favour of the pre-emptor in their presence, then he (the pre-emptor) should get possession of the property from the vendor and pay the price to the vendee, and the contract and its responsibilities will be on vendee, but if he (the vendee) has not paid the price then the pre-emptor should pay the price to the vendor, and the contract and its responsibilities will be upon the vendor. Thus if the pre-emptor finds any defects in the property and returns it either to the vendor or to the vendee by the order of the Court, thereafter if the vendee intends to purchase it at its previous price, and the vendor is also willing, then the vendee has an option to take it or leave it. If the pre-emptor takes the property from the vendee and intends to make a contract with him as a security, then he can do so. He should mention in the contract deed the fact that the vendee purchased the property first and the manner in which it was pre-empted. Thereafter the pre-emptor should take the deed of

يكتب كتابا علي
المشتري ليكون
وثيقة للشفيع
علي المشتري له
ذلك ويحكي في
الكتاب شراء
المشتري اولا ثم
يرتب عليه الا خذ
بالشفعة ويا خذ
الشفيع من المشتري
كتاب شرائه الذي
كتب علي بائعه
وان ابي المشتري
ان يدفع اليه ذلك
فله ذلك ولكن
ينبغي للشفيع ان
يحتاط لنفسه
فيشهد قوما علي
تسليم المشتري
الدار اليه بالشفعة
وان كان الشفيع
اخذ الدار من
البايع يكتب كتابا
علي البائع نحو
ما يكتب لواخذ
من المشتري
ويكتب في هذا
الكتاب اقرار
المشتري انه سلم
جميع مافي هذا
الكتاب واجازه
واقرّ انه لاحق له
في هذه الدار
ولافي ثمنها كذافي
المحيط -

contract, drawn up by the vendor in favour of the vendee and but if the vendee refuses to hand it over to him then he can do so; but it is necessary for the pre-emptor that he should protect himself by invoking witnesses on the fact that the vendee has delivered possession of the property to him on account of his right of pre-emption. And if the pre-emptor takes the property from the vendor, he may draw a similar document stating in the deed the acknowledgment of the vendee to the effect that he has surrendered his right, had acquiesced or acknowledged that he has no right of any kind to the property and no demand as regards its sale-consideration. This is according to the *Muḥīṭ*.

٦٦ – وان شاء كتب الكتاب عليهما بتسليم الدار بالشفعة اليه وقبض البائع الثمن برضاه وضمان البائع الدرك كذا في المبسوط –

66. If the pre-emptor wishes he may draw up a document thus that the mansion has been delivered to him in pre-emption and the vendor has taken its price with the consent of the vendee, and also that the vendor is *ẓimān-ud-dark* responsible for the *dark* any defect creeping in the property. This is according to the *Mabsūṭ*.

٦٧ – واذا قضي القاضي للشفيع او سلم المشتري تثبت بنيهما احكام البيع من خيار رؤية وخيار عيب والرجوع بالثمن عند الا ستحقاق الّا ان الشفيع لا يرجع بضمان الغرور حتي لو بني في الدار المشفوعة ثم استحقت الدار وامر بنقض البناء كان له ان يرجع بالثمن علي من اخذ منه الدار بالشفعة ولا يرجع بقيمة البناء في المشهور من الرواية وعن ابي يوسف

67. When the Kazi has passed a decree in favour of the pre-emptor, or the vendee has delivered the property, then all the legal effects of sale are established, such as the options of inspection and defect, and lien for the price in the event a third person establishes his title to that property, but the pre-emptor is himself responsible for any loss sustained in consequence of his own deception. That is, if he were to erect a building on the land pre-empted and thereafter a third person's title is established in the land and consequently an order is given for the demolition of the building, then he can recover only the sale-consideration from the person from whom he took the property and he cannot recover the value of the new building. This is the accepted view, but Abu Yusuf is of opinion

انه يرجع والمشتري يرجع كذا في التاتار خانية-واذا وقع الشراء بثمن موجل الى سنة مثلا فحضر الشفيع فطلب الشفعة و اراد اخذها الى ذلك الاجل فليس له ذلك الا برضاء الما خوذ منه ويقول القاضي له اذا لم يرض الما خوذ منه اما تنقد الثمن حالا او تصبر حتى يحل الاجل فان نقد الثمن حالا وكان الاخذ من البائع سقط الثمن عن المشتري وان نقد الثمن حالا وكان الاخذ من المشتري يبقي الاجل في حق المشتري على حاله حتى لايكون للبائع ولاية مطالبة المشتري قبل محل الاجل وان صبر حتى حل الاجل فهو على شفعته هذا اذا كان الاجل معلوما واما اذا كان مجهولا نحو الحصاد والدباس واشباه ذلك فقال الشفيع انا اعجل الثمن واخذها

that he can recover the value of the buildings also, however, in similar circumstances the vendee is always entitled, to the cost of buildings. This is according to the *Tātār Khāniyya*. And if the sale has taken place for a deferred price, as, for instance, on credit for one year, then the pre-emptor is not entitled to the benefit of the credit, except with the consent of the persons involved and if that person is not willing then the Kazi should say to the pre-emptor, 'pay down the price at once or wait for pre-emption till the expiration of the period of credit.' If the pre-emptor makes the payment and takes the property from the vendor, then the vendee is not responsible for the price; but if he takes it from the vendee, then the period stipulated for deferred payment remains as it was in favour of the vendee, and the vendor has no power to demand the price from the vendee before the expiration of the term. If the pre-emptor waits till the expiration of the time of payment, then he is entitled to his right of pre-emption, provided the period was fixed and known for if it were an invalid term, as, for instance, 'till harvest' and the pre-emptor is prepared to pay the price

لم يكن له ذلك كذا في المحيط والذخيرة و الفتاوى العتابية -ولوباع الي اجل فاسد فعجل المشتري الثمن جاز البيع وتثبت الشفعة وكذا الارض تباع و فيها زرع المزارع بطلت عندالبيع وفي المجرد روي في الخيار المؤبد و الاجل الي العطاء جاز اخذه بالشفعة و ان لم يطلب في الحال بطلت كذا في التاتار خانية -

immediately and take the subject of sale, then he cannot do so.[1] The *Muīḥt*, the *Zakhira* and the *Fatāwā-i-Itābīyya* express the same view. If the vendee purchases some property and stipulates a *fāsid*, invalid, period for payment of the price but pays it down immediately, then the sale becomes valid, and the right of pre-emption arises. And similarly if the land is sold when crops are standing, then the pre-emptor must demand pre-emption at the time of sale, otherwise his right will be invalidated. And according to the *Mujarrad* in the case of sale, subject to option, it is lawful to take it in pre-emption immediately; and if the pre-emptor does not demand pre-emption his right of pre-emption is invalidated. This is according to the *Tātār Khāniyya*.

٦٨ -الشفعوي اذا طلب الشفعةبالجوار فالقاضي يسا له هل تري الشفعةبالجوار ام لا فان قال نعم يقضي بالشفعة والا فلا كذا في السراجية - رجل اشترى من آخر دارا بالف درهم وباعها

68. If a person who belongs to the *shafī'* school demands pre-emption basing his right on the *jawār* (neighbourhood), the judge should put him this question "Do you believe in *Shufa' bil jawār* or not?" and if he answers affirmatively, the judge will decree pre-emption, otherwise not. This is according to the *Sirājiyya*. A person

[1] The reason here being that the sale itself is invaild.

من اخر بالفي
درهم و سلمها ثم
حضر الشفيع و
اراد ان ياخذ الدار
بالبيع الأول قال ابو
يوسف ؒ ياخذها
من الذي هي في
يديه ويدفع اليه
الف درهم ويُقال
له اطلب صاحبك
الذي باعك فخذ منه
الفا اخرى وروي
الحسن بن زياد
عن ابي حنيفة ؒ
اذا حضر الشفيع
وقد باع المشترى
الدار وسلمها وغاب
واراد ان ياخذها
بالبيع الأول فلا
خصومة بينه وبين
المشتري الاخر
فالحاصل ان الشفيع
او اراد اخذها
بالبيع الأول تشترط
حضرة المشتري الاول
عند ابي حنيفة ؒ
وهو قول محمد ؒ
وفي قول ابي يوسف ؒ
لا تشترط حضرته
وان اراد اخذها
بالبيع الثاني لا

purchases a house from another person for 1000 *dirhams* and sells it to another person for 2000 *dirhams* transferring possession of it to him at the same time. Thereafter the pre-emptor appears and intends to pre-empt the house for the price of the first sale, that is, 1000 *dirhams* then Abu Yusuf holds that he can pre-empt it from the second vendee who has possession of it for the same price, and the second vendee should recover 1000 *dirhams* the remainder of the price which he has paid, from his own vendor. Ḥasan ibn Ziyad relates from Imām Abu Ḥanifa that if the pre-emptor appears while the vendee has already sold and delivered possession of it, and is also absent from the place, and the pre-emptor intends to pre-empt the property on the first sale, then there exists no cause for litigation between him and the second vendee, that is, if the pre-emptor desires to take the house by the first sale according to Imām Abu Ḥanifa and Muḥammad the presence of the first vendee is a necessary condition. But Imām Abu Yusuf holds that it is not a binding condition. However, if the pre-emptor pre-empts the second sale, then without doubt it is not necessary

تشترط حضرة
المشتري الاول بلا
خلاف كذا في
المحيط - فان قال
الشفيع ان لم اجي
بالثمن الي ثلثة
ايام فانا بري من
الشفعة فلم يجي
بالثمن الي ذلك
الوقت ذكر ابن
رستم عن محمد ؒ انه
تبطل شفعته وقال
المشائخ ؒ لا تبطل
شفعته وهو الصحيح
ولوان الشفيع احضر
الدنانير و الثمن
دراهم او علي
العكس اختلفوا فيه و
الصحيح انه لاتبطل
كذا في فتاوىٰ قاضي
خان - و في الفتاوي
العتابية ولو ساله
المشتري ان يوخر
الخصومة الى كذا
وهو علي خصومته
فاجابه فهو كذلك
وفي المنتقى بشر عن
ابي يوسف ؒ ان
قول الشفيع لاحق

that the first vendee should be present and made a party. This is according to the *Muḥīṭ*. And if the pre-emptor says "If I do not pay the price within three days, I shall have no right of pre-emption" and then if he does not tender the price within the stated period, Ibn Rustam reports from Imām Muḥammad that his right of pre-emption is invalidated, but some jurists hold the opposite view and which is correct. If the pre-emptor offers *dinārs*[1] whereas the price was fixed in *dirhams* or produces *dirhams* whereas the price was fixed in *dinārs*, the jurists differ as to the effect, but the correct opinion is that in such cases the right of pre-emption is not invalidated. This is according to the *Fatāwā-i-Kāẓī-Khān*. It is mentioned in the *Fatawa-i-'Itābiyya* that if the vendee asks the pre-emptor to postpone the litigation till a definite period and the pre-emptor acquiesces nevertheless the right continues. It is mentioned in the *Muntaqā* on report by Bashr from Abu Yusuf that such a statement of the pre-emptor, *viz.*, "I have

[1] *Dinar* is a gold coin of much higher value than a *dirham* which is a silver coin now obsolete roughly equivalent to the French franc.

الباب السادس
في الدار اذا بيعت ولها شفعاء

٧٠ - يجب ان يعلم بان الشفعاء اذا اجتمعوا فحق كل واحد قبل الاستيفاء والقضاء ثابت في جميع الدار حتى انه اذا كان للدار شفيعان سلم احد هما الشفعة قبل الاخذ وقبل القضاء كان للآخر ان يا خذ الكل و بعد الاستيفاء و بعد القضاء يبطل حق كل واحد منهما عما قضي لصاحبه حتى اذا كان للدار شفيعان وقضي القاضي بالدار بينهما ثم سلم احد هما نصيبه لم يكن للآخر ان ياخذ الجميع و اذا كان بعض الشفعاء اقوى من البعض فقضي القاضي بالشفعة للقوي بطل حق الضعيف حتى انه اذا اجتمع الشريك والجار وسلم الشريك

CHAPTER VI

Of the sale in which several persons are entitled to pre-empt

70. It should be known that when there are several persons and all of them have the right of pre-emption in a mansion, then each one of them, before perfection of his right or decree in his favour, has a right in the whole mansion and if one of them gives up his right before taking possession and before decree, then the others may take the whole. But after perfection of his right, or after decree, the right of each one is that which has been assigned, or decreed in the capacity of a co-pre-emptor, that is, if there are two pre-emptors to a mansion, and the Kazi decreed pre-emption between them, now one of them surrenders his share, the other cannot take the whole. If some of the pre-emptors have superior right to others, then the Kazi will decree pre-emption to them, and the right of the inferior pre-emptors is invalidated, *e.g.*, if *shafī'-i-shaaīk* and *shafī'-i-jār* together demand pre-emption, and the *shafī'-i-sharīk* surrenders pre-emption before the decree in his favour, then the

الشفعة قبل القضاء له كان للجار ان ياخذها بالشفعة ولو قضي القاضي بالدار للشريك ثم سلم الشريك الشفعة فلا شفعة للجار كذا في الذخيرة – واذا كان احد الشفيعين غائبا كان للحاضر ان ياخذ جميع الدار واذا اراده ان ياخذ النصف و رضي المشتري بذلك فله ذلك وان قال المشتري لا اعطيك الا النصف كان له ان ياخذ الكل كذا في المبسوط – وان كان الحاضر قال في غيبة الغائب انا اخذ النصف او الثلث وهو مقدار حقه لم يكن له الا ان ياخذ الكل او يدع كذا في السراج الوهاج – واذا قضي القاضي للحاضر بكل الدار ثم حضر آخر وقضي له بالنصف ثم

shafī'-i-jār is entitled to pre-empt the property, and if the Court had decreed the mansion to the ***sharīk*** thereafter he surrenders his right, then the *shafī'-i-jār*, has no right of pre-emption to the mansion. This is according to the *Zakhira.* If one of the two pre-emptors is absent, then the present pre-emptor is entitled to take the whole mansion and if he desires to take half of it and the vendee agrees to it, he could do so, but if the vendee says 'No, I shall not give you the whole but the half only,' then nevertheless he has the right to take the whole. This is according to the *Mabsut.* And if the present pre-emptor says in the absence of the other pre-emptor 'I shall take half, or one-third which is my actual share only,' then he is not entitled to do so, he must either take the whole or give up his right. This is according to the *Sirāj-al-Wahhāj.* And if after the Kazi has decreed the whole house to the present pre-emptor, thereafter another pre-emptor appears to whom he decrees one-half, thereafter the third pre-emptor comes forward to whom he also decrees one-third of what the two previous pre-emptors had received so that their shares become

حضر آخر قضي
له بثلث ماقي
يد كل واحد منهما
حتي يصير مساويا
لهما فان قال الذي
قضي له بكل الدار
اولاً للثاني انا
اسلم لك الكل
فاما ان تاخذ الكل
او تدع فليس له
ذلك وللثاني ان
ياخذ النصف كذا
في المحيط - ولو
حضر واحد من
الشفعاء اولاً
واثبت شفعته
فان القاضي يقضي
له بجميعها ثم اذا
حضر شفيع آخر
واثبت شفعته فان
القاضي ينظر ان
كان الثاني شفيعا
مثل الاول فانه يقضي
له بنصف الدار
وان كان الثاني
اولي كما اذا كان
الاول جاراً والثاني
خليطا فان القاضي
يبطل شفعة الاول
ويقضي الجميع الدار
للثاني وان كان
الثاني دون الاول
فانه لا يقضي له
بشئي كذا في
السراج الوهاج -

equal, now if the pre-emptor to whom the whole of the house was decreed, says to the second pre-emptor to whom the half was decreed "I resign the whole in your favour, either take the whole or give up the whole," he cannot do so, and the second is entitled to take the half only. This is according to the *Muhīt*. If one of the several pre-emptors appear first and establishes his right and the Kazi decrees the whole house in his favour, thereafter another pre-emptor appears, then the Kazi, if he is of the opinion that both of them have equal rights will decree half of the property to him also, but if he is of opinion that the second one has a superior right, *e. g.*, if the first pre-emptor happens to be a *Shafi'-i-Jar* and the second *Shafi'i-Khalit*, the Kazi will invalidate the right of the first and decree the whole to the second, and if the second has an inferior right to the first, then he shall not pass any decree at all. This is according to the *Siraj-āl-Wahhāj*.

٧١ - ولو ان رجلا اشترى دارا وهو شفيعها ثم جاءه شفيع مثله قضي القاضي بنصفها وان جاءه شفيع آخر اولى منه فان القاضي يقضي له بجميع الدار وان جاءه شفيع دونه فلا شفعة له هكذا في شرح الطحاوي - ولو قضي بالدار للحاضر ثم وجد بها عيبا فردها ثم قدم الغائب فليس له ان ياخذ بالبيع الاول الا نصف الدار سواء كان الرد بالعيب بقضاء له او بغير قضاء وسواء كان قبل القبض او بعده ولو اراد الغائب ان ياخذ كل الدار بالشفعة برد الحاضر بالعيب ويدع البيع الاول ينظر ان كان الرد بغير قضاء فله ذلك لان الرد بغير قضاء بيع

71. If a pre-emptor purchases a house and another co-pre-emptor who has an equal right of pre-emption to the house appears, then the Kazi will decree in his favour half of the house. And if afterwards another person who has a better right appears and prefers his claim, then the Kazi will decree the whole house to him, and if a person having an inferior right appears, then he is not entitled to pre-emption. This is according to the *Sharh-al-Tahāwī*. If after the house has been decreed to the pre-emptor he returned it to the vendor on account of defect, and another pre-emptor who was absent appears, he can pre-empt only half of the house by the first sale whether the house was returned on account of defect with the order of the Court or without it or whether it was before or after taking possession of it. And if the absentee pre-emptor desires to take the whole of the house in pre-emption by reason of the fact that the first pre-emptor had returned it on account of defect, and he also desires to give up his right on the first sale, then it is to be considered whether the return was without the order of the Court, and if so, he can pre-empt it,

مطلق فكان بيعا جديدا في حق الشفعة فياخذ الكل بالشفعة كما ياخذ بالبيع المبتدا هكذا ذكر محمد رح واطلق الجواب ولم يفصل بينهما اذا كان الرد بالعيب قبل القبض او بعده من مشائخنا من قال ما ذكر من الجواب محمول علي مابعد القبض لان الرد قبل القبض بغير قضاء بيع جديد و بيع العقار قبل القبض لا يجوز علي اصله و انما يستقيم اطلاق الجواب علي اصل ابي حنيفة و ابي يوسف رح ومنهم من قال يستقيم علي مذهب الكل و ان كان بقضاء فليس له ان ياخذ لانه فسخ مطلق ورفع العقد من الاصل كانه لم يكن والاخذ بالشفعة يختص

because the return without the order of the Court is considered as an absolute sale and with reference to his right of pre-emption, it will be a new sale, therefore he can take the whole of the house in pre-emption. Imām Muhammad has stated the same view but not in detail as to what should be the law if before or after possession of the property the return takes place on account of defect. Our jurists hold that what he has said applies to the fact when the property after it was taken possession of was returned on account of defect, because the return after taking possession and without the order of the Court is considered as a new sale, and further the sale of any property before its possession is taken is not lawful. However, this view is correct according to Imām Abu Hanifa and Imām Abu Yusuf and according to our jurists. And if the return was made after the order of the Court the pre-emptor cannot take it because it amounts to the cancellation of the sale as if the transaction had never taken place at all, while the right of pre-emption is based on validity of sale itself. However, if the pre-emptor being aware of the defect surrendered the right

بالبيع ولو اطلع
الحاضر علي عيب
قبل ان يقضي له
بالشفعةفسلم الشفعة
ثم قدم الغائب
فان شاء اخذ الكل
و ان شاء ترك ولو
ردالحاضر الدار
بالعيب بعد ماقضي
له بالشفعة ثم حضر
شفيعان اخذ اثلثي
الدار بالشفعةوالحكم
في الا ثنين والثلث
سواء يسقط حق
الغائب بقدر حصة
الحاضر ولو كان
الشفيع الحاضر
اشتري الدار من
المشتري ثم حضر
الغائب فان شاء
اخذ كل الدار
بالبيع الاول وان
شاء اخذ كلها
باليبع الثاني ولو
كان المشتري الاول
شفيعاللدار فاشتراها
الشفيع الحاضر منه
ثم قدم الغائب
فان شاء اخذ
نصف الدار بالبيع
الاول لان المشتري
الاول لم يثبت له
حق الشراء قبل
الشراء حتي يكون
بشرائه معرضا عنه
فاذاباعه من الشفيع

before the decree of pre-emption was made in his favour and thereafter the absentee appears, then if he desires he may take the whole of the house or give up his right. And if the pre-emptor had returned the house on account of defect after the decree of pre-emption was made in his favour, and then two other pre-emptors appear, they both can take two-thirds of the house in pre-emption. The same rule applies whether there are two or three pre-emptors, that is, the right of the absentees is determined with reference to their numbers. If a pre-emptor did not pre-empt the property but purchased it from the vendee, thereafter an absentee pre-emptor appears, then he can, if he desires, take the whole house by the first sale or by the second sale. However if the first vendee happens to be the pre-emptor of the house also and then another pre-emptor who is present purchases it from him, and afterwards an absentee pre-emptor appears, then he can, if he desires, take half of the house by the first sale, because the first vendee had not acquired ownership before he had himself purchased the property, hence when he sells the house to the other pre-emptor,

الحاضر لم يثبت للغائب الا مقدار ما كان بحقه بالمزاحمة مع الاول وهو النصف لان السبب عند البيع الاول اوجب الشفعة للكل في كل الدار وقد بطل. حق الشفيع الحاضر بالشراء لكون الشراء دليل الاعراض فبقي حق المشتري الاول والغائب في كل الدار فيقسم بينهما فياخذ الغائب نصف الدار بالبيع الاول وان شاء اخذ الكل بالبيع الثاني لان السبب عند العقد الثاني اوجب الشفيع حق الشفعة ثم بطل حق الشفيع الحاضر عند العقد الاول ولم يتعلق باقدامه علي الشراء الثاني لاعراضه فكان للغائب ان ياخذ كل الدار بالعقد الثاني ولو كان المشتري الاول اجنبيا اشتراها بالف فباعها من اجنبي بالفين فحضر الشفيع فالشفيع

then nothing is established for the absentee except the extent of the share to which he is entitled, as between him and the first vendee and that share is half, because at the first sale *Shuf'a* appertains to every one of the pre-emptors in the whole of the house, and the right of the pre-emptor who was present has been invalidated on account of his own purchase since the fact of purchase shows that he was disinclined to pre-empt it, and hence the right of the first vendee and the absentee remain in the whole of the property and so the house would be divided between them equally and the absentee would take half of the house by the first sale, and if he desires, he can take the whole of it by the second sale because at the second sale the right of pre-emption of the present pre-emptor is considered to have been waived, and therefore the absentee is entitled to take the whole house on the second sale. And if the first vendee is a stranger and he has bought the house for 1000 *dirhams* and sells it to another stranger for 2000 *dirhams*, thereafter the pre-emptor appears, then the pre-emptor has the option, either to take the house by the first sale, or by the second sale for the

بالخيار ان شاء
اخذ بالبيع الاول
وان شاء اخذ
بالبيع الثاني لوجود
سبب الا ستحقاق
وشرطه عند كل
واحد من البيعين
فان اخذ بالبيع
الاول سلم الثمن
الي المشتري الاول
والعهدة عليه و
ينفسخ البيع الثاني
و يسترد المشتري
الثاني الثمن من
الاول و ان اخذ
بالبيع الثاني تم
البيعان جميعا و
العهدة علي الثاني
غير انه ان
وجد المشتري
الثاني والدار في
يده فله ان ياخذه
بالبيع الثاني سواء
كان المشتري الاول
حاضرا او غائبا وان
اراد ان ياخذ
بالبيع الاول فليس
له ذلك حتي يحضر
المشتري الثاني
هكذا ذكر القاضي
الامام الا سبيجابي
في شرحه المختصر
الطحاوي ولم يحك
خلافا وذكر الكرخي
ان هذا قول
ابي حنيفه ومحمد

cause and condition of establishing the right of pre-emption are in existence at the time of both of the sale transactions, then if he pre-empts the first sale, he shall deliver the price to the first vendee and the contract is with him and the second sale would be annulled and the second vendee would become entitled to recover the price from the first vendee; but if he pre-empts the second sale, then both of the transactions stand valid and the contract is with the second vendee and if the pre-emptor finds that the second vendee has the possession of the house, then he may pre-empt the house by the second sale, no matter whether the first vendee is present or absent, and if he desires to take it by the first sale, he cannot do so until the first vendee presents himself. The above view is stated without difference of opinion by Kazi Imām Isbījābī in his work the *Sharh-al-Mukhtaṣar-ul-Ṭaḥāwī*. Karkhī says that this is the view of Imām Abu Hanifa and Muḥammad also. And if in this case the vendee had sold half of the house and not the whole of it, there after the pre-emptor came and desired to pre-empt the first sale, then he is entitled to take the whole of it by

ولو كان المشتري
باع نصف الدار
ولم يبع جميعها
فجاء الشفيع وراد
ان ياخذ بالبيع
اخذ جميع الدار
ويبطل البيع في
النصف الثاني من
المشتري وان اراد
ان ياخذ النصف
بالبيع الثاني فله
ذلك ولو كان
المشتري لم يبع
الدار ولكنها وهبها
من رجل او
تصدق بها على
رجل وقبضها الموهوب
له او المتصدق
عليه ثم حضر
الشفيع والمشتري
والموهوب له حاضر
اخذها الشفيع
بالبيع لا بالهبة
ولا بد من حضرة
المشتري حتى لو
حضر الشفيع ووجد
الموهوب له فلا
خصومة معه حتى
يحضر المشتري ثم
ياخذها بالبيع الاول
والثمن للمشتري
بطلت الهبة كذا
ذكره القاضي من
غير خلاف ولو
وهب المشتري نصف
الدار مقسوما

the first sale and the subsequent sale made by the first vendee would thereby be invalidated, however if he desires to take half of the house by the second sale, he can do that also. If the vendee had not sold the house but made a gift of it to some person or had given it away in *sadqah* charity to some person, and the donee or the person to whom the house was given in *sadqah* has obtained possession of the same, thereafter the pre-emptor appears, and if the vendee and the donee are present, then he can pre-empt the house by the first sale and not by the *hiba*, and the presence of the vendee is absolutely necessary, so that if the pre-emptor finds only the donee, then he cannot litigate against him, unless the vendee comes, for then he would take the house on the first sale and the price would be paid to the vendee, and the gift would be invalidated. Kazi Imām Isbījābī has also stated this view without difference of opinion. If the vendee makes a gift of half of the house after dividing it, and delivers it to the donee, thereafter the pre-emptor appears and desires to take the remaining half of the house for half the original price, he cannot do so ; but he can take

وسلمه الي الموهوب له ثم حضر الشفيع فاراد ان ياخذ النصف الباقي بنصف الثمن ليس له ذلك ولكنه ياخذ جميع الدار بجميع الثمن او يدع وبطلت الهبة وكان الثمن كله للمشتري لا الموهوب له كذا في البدايع -

the whole of the house for the full price or give up his claim. If he pre-empts the whole, then the gift will be nullified, and the whole of the price will be paid to the vendee and not to the donee. This is according to the *Bidāya.*

٧٢ - رجل اشترى دارا ولها شفيعان احدهما غائب وطلب الحاضر الشفعة فقضي القاضي له ثم جاء الشفيع الثاني فان الشفيع الثاني يطلب الشفعة من الشفيع الحاضر الذي قضى له القاضي لا من المشتري هذا اذا طلب الشفيع الحاضر جميع الدار بالشفعة فان طلب النصف على ظن - انه لا يستحق الا النصف بطلت شفعته

72. A person buys a house which has two pre-emptors, one of whom is absent. The present pre-emptor demands pre-emption and the Kazi decrees the same to him, thereafter the second pre-emptor appears, then he should demand pre-emption from the pre-emptor to whom the Court had decreed pre-emption and not from the vendee, and this is so when he has pre-empted the whole house, for if he had demanded pre-emption in the half only then his right was invalidated. And similarly if both of the pre-emptors are present, and then each one of them demands pre-emption in the half, then both of them will forfeit their right of pre-emption, because each one of them for not having demanded pre-

وكذا لو كانا حاضرين فطلب كل واحد منهما الشفعة في النصف بطلت شفعتهما لان كل واحد منهما لما لم يطلب الكل بطلت شفعته في النصف الذي لم يطلب فاذا بطلت شفعته في النصف تبطل في الكل كذا في فتاوى قاضي خان -

emption in the whole loses his right in the half in which he has not demanded pre-emption, and when his right in the half is invalidated, it is invalidated in the whole. This is according to the *Fatāwā-i-Kazi Khān.*

الباب السابع

في انكار المشتري جوار الشفيع و ما يتصل به

٧٣ - وفي الاجناس بين كيفية الشهادة فقال ينبغي ان يشهدوا ان هذه الدار التي بجوار الدار المبيعة ملك هذا الشفيع قبل ان يشتري هذا المشتري هذه الدار وهي له الى هذه الساعة لا نعلمها خرجت عن ملكه فلو قال ان هذه الدار لهذا الجار لا يكفي لو شهدوا ان الشفيع كان اشترى هذه الدار من فلان وهي في يده او وهبها منه فذلك يكفي فلو اراد الشفيع ان يحلف المشتري بالله فله ذلك كذا في المحيط والذخيرة -

CHAPTER VII

OF THE VENDEE'S REFUSAL TO ADMIT THE PRE-EMPTOR'S NEIGHBOURHOOD AND MATTERS APPERTAINING TO IT.

73. The manner in which evidence is to be tendered has been described in the '*Ajnās* and it should be thus, "The witnesses should depose that the property which is in the vicinity of the property sold, is the pre-emptor's own property, and it has been so before the vendee purchased the property which is the subject-matter of pre-emption, and that it is still his property and they have no knowledge that it is not in his ownership." If they were simply to say, "this house belongs to this neighbour," it will not be considered sufficient. But if they depose that this pre-emptor had purchased this house from such and such person, or that a certain person made a gift of it to him, then such a deposition would suffice. If the vendee desires the pre-emptor to swear, then he can do so. This is according to the *Muḥīṭ* and the *Zakhīra*.

و عن ابي يوسف
لو ادعى رجل دارا
و اقام بنيته ان هذه
الدار كانت في يدي
ابيه مات و هي
في يديه فانه يقضي
له بالدار و لو بيعت
دار بجنبها فانه
لا يستحق الشفعة
حتى يقيم البنية
علي الملك دار
في يدي رجل
اقرانها لاخر فبيعت
بجنبها دار فطلب
المقر له الشفعة
فلا شفعة له حتى
يقيم البنية ان
الدار داره كذا في
محيط السرخسي -
رجل اشترى
دارا ولها شفيع
فاقر الشفيع ان
داره التي بها
الشفعة لاخر فان
كان سكت عن
الشفعة ولم يطلبها
بعد فلا شفعة للمقر
له و ان كان طلب
الشفعة فللمقر له
الشفعة كذا في
المحيط - وذكر
الخصاف في اسقاط
الشفعة ان البايع
اذا اقر بسهمهم من
الدار للمشتري ثم باع

According to Imām Abu Yusuf if a person sues for a declaration and tenders evidence to the effect that a certain house was in possession of his father and he died while the house was in his actual possession, then he is entitled to the decree. Thereafter if an adjacent house is sold, then he will not be entitled to pre-empt it, unless he had thus established his ownership of the house. A house is in possession of a certain person and he admits that it belongs to another person, meanwhile an adjacent house is sold then he (the admittor) is not entitled to claim pre-emption unless he establishes ownership of the first house. This is according to the *Muḥīṭ-of-Sarakhsi*. A person purchases a house and there is its pre-emptor who admits that his house by reason of which he can claim pre-emption belongs to another person, and if that other person does not demand pre-emption then nevertheless he (the pre-emptor) is not entitled to pre-empt the house, but if that person demands pre-emption then he can also demand pre-emption. This is according to the *Muḥīṭ*. Shaikh Khiṣāf has mentioned in this case that if the seller admits ownership of the vendee in a part of the house, and thereafter sells it to him then the *shafī'-i-jār* is not entitled to

منه بقية الدار فالجار لا يستحق الشفعة وكان ابوبكر الخوارزمي يخطي الخصاف في هذه و يفتي بوجوب الشفعة للجار والله اعلم كذا في الذخيرة -

pre-empt it; but Shaikh Abu Khwāzmi differing from Shaikh Khiṣāf holds that the ***Shafi'-i-Jār*** is entitled to pre-emption. This is according to the *Zakhira*.

الباب الثامن

في تصرف المشتري في الدار المشفوعة قبل حضور الشفيع

٧٣ - ان بني المشتري بناء اوغرس او زرع ثم حضر الشفيع يقضي له بالشفعة و يجبر المشتري علي قلع البناء والغرس في تسليم الساحة الي الشفيع الا اذا كان في القلع نقصان بالارض فللشفيع الخيار ان شاء اخذ الارض بالثمن والبناء والغرس بقيمة مقلوعا وان شاء اجبر المشتري علي القلع وهذا جواب ظاهر الرواية واجمعوا ان المشتري لو زرع في الارض ثم حضر الشفيع انه لا يجبر المشتري علي قلعه ولكنه ينتظر ادراك الزرع ثم يقضي له بالشفعة فياخذ الارض بجميع الثمن كذافي البدايع ثم اذا ترك الارض

CHAPTER VIII

Of dealings by the vendee with the subject of sale, before the appearance of the Pre-emptor.

74. When a purchaser has erected a building, or planted trees or sown seeds in the land, thereafter the pre-emptor appears and a decree is given in his favour, then the purchaser may be required to pull down the building and remove the trees at the time of deliveryof the land to the pre-emptor, however if the land is likely to be injured by the removal then the pre-emptor has theoption, to take the land at its price, and the buildings and trees at the value of the materials calculated after destruction. This view is expressed in the *Zāhir-ul-Rewāyat*, but with regard to crops, all are agreed that the pre-emptor cannot require the purchaser to remove it, and that he must wait till the ripening of the crops, thereafter the land is to be pre-empted at its full price. This is according to the *Badāyi'*. And when the land is left in the hands of the purchaser, it will not be on hire or rent. This problem is mentioned in the *Fatawa-of-Abu Laysh* as

في يد المشتري يترك
بغير اجر و من
هذا الجنس مسئلة
في فتاوىٰ الفقيه
ابي الليث [2] و
صورتها رجل اخذ
ارضا مزارعة وزرعها
فلما صار الزرع
بقلا اشتري المزارع
الارض مع نصيب
رب الارض من
الزرع ثم جاء الشفيع
فله الشفعة في
الارض وفي نصف
الزرع لكن لا ياخذ
حتي يدرك الزرع
كذا في المحيط -
وفي جامع الفتاوىٰ
ولو اشترىٰ ارضا
فزرعها فنقصتها
الزراعة ثم جاء
الشفيع يقسم علي
الارض ناقصة وعلي
قيمتها يوم اشتراها
فياخذ الشفعة بذلك
الثمن كذا في التاتار
خانية - اشتري دار
او صبغها بالوان
كثيرة فا لشفيع
بالخيار ان شاء
اخذها و اعطاه ما زاد
الصبغ فيها و
ان شاء ترك كذا

follows :—'If a person takes a land for cultivation, and cultivates it, and the crops are ripened, thereafter he purchases the land together with the share of the landlord in the crops, and subsequently the pre-emptor appears, then he can demand pre-emption in the land and in half of the crops,[1] but he cannot pre-empt the land until the crops are ready. This is according to the *Muḥīṭ*. According to the *Jāmi-'al-Fātawā* if a person purchases the land, and cultivates it, and the land is injured by such cultivation, thereafter the pre-emptor appears, then the price is to be fixed according to the value of the land as deteriorated by cultivation, and its value at the time of sale and the pre-emptor is to take the land at the reduced price. This is according to the *Tātār Khāniyya*. If a person has purchased a mansion, and decorates it with paints and drawings, the pre-emptor has an option either to take it on payment of the additional expenses so incurred, or give up his right. This is according to the *Qanyya*. If a man purchases a mansion, and has pulled

---

[1] It seems that this was the agreement between the parties.

في القنية - اذا اشتري رجل دارا و هدم بناءها او هدمها اجنبي او انهدم بنفسه ثم جاء الشفيع قسم الثمن علي قيمة البناء مبنيا وعلي قمية الارض فما اصاب الارض اخذها الشفيع بذلك معني المسئلة اذا انهدم البناء وبقي النقض علي حاله الا انه اذا انهدم بفعل المشتري او بفعل الاجنبي يقسم الثمن علي قيمة البناء مبنيا واذا انهدم بنفسه يقسم الثمن علي قيمة مهدوما لان بالهدم دخل في ضمان الهادم فتعتبر القيمة علي الوصف الذي دخل في ضمانه وبالانهدام لم يدخل في ضمان احد فتعتبر قيمة علي الحالة التي عليها مهدوما حتي انه اذا كان قيمة الساحة خمسمائة وقيمة البناء خمسمائة فانهدم البناء وبقي

down the building, or a stranger has done so, or it has itself fallen down, thereafter the pre-emptor claims his right, then the price is to be divided according to the value of the building as it was while standing and the value of the land, and the pre-emptor is to take the land at so much of the price as corresponds to its value. There is a difference between the case, where the building is destroyed by the act of the purchaser or a stranger, and the case where the building is destroyed by *vis major*; for in the former case, the price is to be divided with reference to the value of the building as it was when standing, while in the latter case the price is to be calculated with reference to its value in the state of ruin, because when the building has been destroyed by somebody then that person is responsible for it and its value is to be estimated as at the time when this incident happened, while if it has itself fallen down, then no one being responsible, its value is to be estimated in its actual state, *e.g.*, if the value of the site were five hundred, and the original value of the building five hundred also, and the building has fallen down, leaving

النقض وهو يساوي ثلثمائة فالثمن يقسم علي قيمة الساحة خمسمائة وعلي قيمة النقض ثلثمائة اثمان فياخذ الشفيع الساحة بخمسة اثمان الثمن و لو احترق البناء او ذهب به السيل ولم يبق شئي من النقض ياخذ الشفيع الساحة بجميع الثمن لانه لم يبق في يد المشتري شئي له ثمن ولو لم يهدم المشتري البناء ولكن باعه من غيره من غير ارض ثم حضر الشفيع فله ان ينقض البيع و ياخذ الكل كذا في المحيط وان نقض المشتري البناء قيل للشفيع ان شيئت فخذ العرصة بحصتها وان شيئت فدع وليس له ان ياخذ النقض و كذا اذا هدم البناء اجنبي و كذا اذا انهدم بنفسه ولم يهلك لان الشفعة سقطت عنه وهو

the old materials of the value of three hundred, then the price is to be divided into eight parts, and the pre-emptor may take the site at five eighths[1] of it. However if the building was burnt down by fire or completely destroyed by inundation, so as to leave nothing of the wreck in the hands of the purchaser, the pre-emptor must take the land at the full price, for no part of the property remains in the hands of the vendee. If the purchaser has not destroyed the building, but sold it without the land, and then the pre-emptor appears, he may pre-empt the whole and thereby avoid the sale. This is according to the *Muḥīṭ*. If the building was destroyed by the purchaser, the pre-emptor may either take the site at its proportionate price or give up his claim, but he cannot take the wrecked materials. The same rule applies in the case where the building has been pulled down by a stranger or has fallen by itself the pre-emptor cannot take the materials, for they are now separate and there is no right of pre-emption in them. Similarly if the purchaser has removed the gate of

---

[1] That is $\frac{5}{8}$ of 800 = 500

عين قائمة ولا يجوز ان يسلم للمشتري بغير شئي وكذا لو نزع المشتري باب الدار وباعه تسقط عن الشفيع حصة كذا في السراج الوهاج -

٧٥ - واذا اشترى دارا فغرق نصفها فصار مثل الفرات يجري فيه الماء لا يستطاع رد ذلك عنها فللشفيع ان ياخذ الباقي بحصة من الثمن ان شاء و اذا اشترى فوهب بناء ها لرجل او تزوج عليها وهدم لم يكن للشفيع علي البناء سبيل ولكن ياخذ الارض بحصتها من الثمن وان كان لم يهدم فله ان يبطل تصرف المشتري و ياخذ الدار كلها بجميع الثمن كذا في المبسوط-اذا اشترى ارضا فيها نخل او شجر فيه ثمر واشترط ثمره في البيع ثم جاء الشفيع والثمرة قائمة

the building its price will be deducted from the original price. This is according to the *Sirāj-al-Wahhāj*.

75. If a person purchases some property half of which is submerged in the water, and has become one with it just like the Euphrates so that its reclamation is impossible, then the pre-emptor has a right to take the remaining half at its proportionate price. If a person purchases some property, land with a building on it, thereafter he makes a gift of the building to some other person, or has assigned it to a woman as her dower, and it has been destroyed, now the pre-emptor cannot possibly take the building, but can pre-empt the land on proportionate payment of its price, and if the building was not demolished, then the pre-emptor has a right to take the whole property at its full price and thereby nullify any transaction effected by the vendee. This is according to the *Mabsūt*. And if a person purchases some land having trees and other trees bearing fruits with an express condition

فله ان ياخذ ذلك اجمع استحسانا فان جاء وقد جزة البايع او المشتري او اجنبي فلا شفعة في الثمرة و ياخذ الارض والنخل بالحصة من الثمن ان شاء وعند حصة الثمرة يقسم الثمن علي قيمة الارض والنخل والثمر يوم العقد فما اصاب الثمرة سقط عن الشفيع وقيل له خذ الارض والنخل بحصتهماان شيئت فان اخذها الشفيع وبقيت الثمرة في يد البائع فان محمداً قال يلزم المشتري الثمرة ولا خيار له في ردها ولو كانت الثمرة قائمةفقبضها المشتري واكلها او باعها او تلفت في يده علي وجه من الوجوه فاراد الشفيع الاخذ سقط عنه حصة

in the contract that the fruits will belong to the vendee, thereafter the pre-emptor appears at the time when the fruits were ready, then according to the doctrine of *Istehsan* he has the right to take the whole property sold. But if the pre-emptor came at a time when either the vendor or the vendee or the stranger had removed the fruits, then he will have no right of pre-emption in the fruits, but if he desires, he may take the land and the trees on payment of their proportionate price. And to ascertain the value of the fruits the original price will be divided according to the value of land, trees, and the fruits as they were at the time when the, contract was effected, and the price of the fruits will be deducted in favour of the pre-emptor, and he may take the trees and the land at so much of the price as corresponds to their values. And if the pre-emptor has pre-empted them both[1] while the fruits were in the possession of the vendor, then according to Imam Muhammad the vendee may take the fruits. If the fruits were ready and the vendee after taking possession of the property had consumed them,

[1] That is the land and the trees.

الثمرة وان كان
البيع قد وقع ولا
ثمرة ثم اثمر في
يد البائع بعد
البيع قبل القبض
ثم جاء الشفيع
فانه ياخذ الارض
والنخل والثمر وليس
له ان ياخذ بعضها
دون بعض ويكون
عليه جميع الثمن
ولو جزه البايع
او المشتري او اجنبي
وهو قائم في يد
البايع او المشترى
اخذ الشفيع الارض
والنخل بحصة ان
شاء وان كانت
الثمرة ذهبت بغير
فعل احد بان
احترقت او اصابتها
آفة فهلكت فلم
يبق منها شئي
له قيمة · اخذها
الشفيع بجميع الثمن
ان شاء وان شاء
ترك ولو كان البايع
او المشتري صرم
الثمرثم هلك بعد ذلك
بغير فعل احد بان

or had sold them, or they were destroyed on account of some cause, and now the pre-emptor desires to pre-empt the property, then the price of the fruits will be deducted from the sale consideration. And if the sale took place at a time when the trees had no fruits, and afterwards the trees bore fruits while they were still in the possession of the vendor, and before the possession had been taken by the vendee, thereafter the pre-emptor appears, then he is entitled to take the land, the trees and the fruits, and he has no option to take one thing and reject the other; and he shall pay the full sale consideration. If the fruits were plucked either by the vendor, or the vendee or any stranger, while they were in the possession of either of the vendee or the vendor, then the pre-emptor if he desires, may take the land and the trees on paying their proportionate price. If the fruits were not destroyed by an act of the vendee or the vendor, for example, were burnt, or were destroyed by any calamity *vis major* so that nothing remains, then the pre-emptor has the option of taking the whole at its full price, or abandon it altogether. But if the vendor or vendee had plucked the fruits, and subsequently

اصابه سيل فذهب به و نار فاحترق فان ابا يوسف رح قال ذلك سواء لان ذلك قد صار للمشتري ولا شفعة فيه فلا ابالي هلكت بفعل المشتري او بغير فعله لان الثمرة لما انفصلت سقط حق الشفيع عنها فكانها كانت في الاصل منفصلة ولو كان المشتري قبض الارض و النخل ولا ثمرة فيه ثم اثمر في يده ثم جاء الشفيع و الثمر متعلق بالنخل فله ان ياخذ الارض والنخل و الثمر بالثمن الذي وقع عليه البيع لايزاد عليه شيء فان كان المشتري لما حدثت الثمرة في يده جزها ثم جاء الشفيع وهي قائمة او قد استهلكها المشتري ببيع او اكل فان الشفيع ياخذ الارض والنخل

they were destroyed, but not by any act of either of them, for example they were swept away by an inundation or destroyed by fire, then according to Imām Abu Yusuf, this case is similar to the former case, because these fruits had already become the property of the vendee. However, it seems that Imām Abu Yusuf does not consider whether they were destroyed by the act of the vendee or not, for when they were separated from the trees then as regards the fruits the right of pre-emption was extinguished just as if they were originally separate. If at the time when the vendee had taken possession of the land and the trees, they were fruitless, but bore fruits afterwards, thereafter the pre-emptor appears while the fruits were still hanging on the trees, then he is entitled to take the land, the trees with fruits, all on payment of the original price and nothing more will be added to it; but in the case where the trees bore fruits while they were in the possession of the vendee, and he has plucked them, thereafter the pre-emptor appears while the fruits so plucked are still in his possession, or have been disposed of by sale, or have been consumed by him, then the pre-emptor is entitled

بجميع الثمن ان
شاء ولا سبيل له
علي الثمر كذا في
السراج الوهاج -
٧٦ - ولو تصرف
المشتري في الدار
المشتراة قبل اخذ
الشفيع بان وهبها
و سلمها او تصدق
بها او آجرها او
جعلها مسجدا و
صلي فيها او وقفها
و قفا او جعلهامقبرة
ودفن فيهافللشفيع
ان يا خذ و ينقيض
تصرف المشتري
كذا في شرح الجامع
الصغير لقاضي
خان - يجب ان
يعلم ان تصرف
المشترى في الدار
المشفوعة صحيح
الي ان يحكم
بالشفعة للشفيع و
له ان يبيع و ان
يوجر و يطيب له
الثمن والاجر وكذا
له ان يهدم وما
اشبه ذلك من
التصرفات غير ان
للشفيع ان نيقض
كل التصرف الا
القبض وما كان من
تمام القبض الا يرى

to take the land and the trees on payment of the price, and as regards the fruits he has no right of pre-emption. This is according to the *Sirāj-al-Wahāj*.

76. If the vendee disposes of some purchased mansion before it is taken by the pre-emptor, as for instance, by gift and delivery, or by letting it on hire, or converting it into a *masjid* and allowing people to offer their prayers in it, or makes it a *waqf*, or a cemetery permitting burial, nevertheless the pre-emptor is entitled to pre-empt the mansion and thereby cancel all those transactions effected by the vendee. This is according to the *Jami'-i-Saghīr* of Kazi Khan. And it is proper to observe that all transactions of the vendee with respect to the property, subject to the right of pre-emption, such as the sale of it, or letting it on hire, are valid, until the Court's decree is given in favour of the pre-emptor. The vendee has also the right to demolish the property or do any similar act with respect to it, nevertheless the pre-emptor is entitled to cancel all acts of the vendee except the act of taking possession of the property itself and all that is necessary to complete it; for if the pre-emptor

ان الشفيع لو اراد
ان ينقض قبض
المشتري لبعيد
الدار الى يد البائع
وياخذها منه
لايكون له ذلك
كذا في الذخيرة -
لو اشترى نصف
دار غير مقسوم
اخذ الشفيع حظه
الذي حصل له
بقسمته وليس له ان
ينقض القسمة سواء
كانت القسمة بحكم
القاضي او التراضي
بخلاف ما اذا باع
احد الشريكين
نصيبه من الدار
المشتركة و قاسم
المشتري الشريك
الذي لم يبع حيث
يكون للشفيع نقضه
لان العقد لم يقع
من الذي قاسم فلم
تكن القسمة من
تمام القبض ثم اذا
لم يكن للشفيع
نقض قسمته كان له
ان ياخذ نصيب
المشتري في اي
جانب كان وهومروى
عن ابي يوسف
واطلاق الكتاب
يدل عليه كذا في
التبيين -

were to avoid this also, then he will be relegating the property back to the vendor and it will not be pre-emptable at all. This is according to the *Zakhīra*. If a person purchases half of an undivided mansion, then the pre-emptor must take the portion which comes on partition to the share of the purchaser, and he cannot dissolve the partition, whether made voluntarily or by the order of the Court. But this is contrary to the case where one of two partners sells his share in a mansion, and the vendee effects a partition with the other partner; for here the pre-emptor may cancel the partition, as the partition was not made by the party with whom the contract was made, and the act of partition is not, an act towards completion of the act of taking possession of the property. Hence in the case where the pre-emptor is not entitled to cancel the vendees' partition, the pre-emptor can only pre-empt the portion already partitioned; the same is reported from Abu Yusuf. This is according to the *Tabayīn*.

٧٧ - رجلان
اشتريا دارا و هما
شفيعان و لها شفيع
ثالث اقتسماها ثم
جاء الثالث فله
ان ينقض القسمة
اقتسماها بقضاء
او غير قضاء كذا في
الذخيرة- رجل اشترى
ارضا بماءة درهم
ورفع منه التراب
وباعه بمائة درهم
ثم جاء الشفيع
و طلب الشفعة
قال الشيخ الامام
ابو بكر محمد بن
الفضل ياخذ
الشفيع الارض بنصف
الثمن وهو خمسون
درهما يقسم الثمن
علي قيمة الارض قبل
رفع التراب و علي
قيمة التراب المرفوع
ثم . يطرح عن
الشفيع قيمة التراب
وقال القاضي الامام
علي السغدي
لايطرح عن الشفيع
نصف الثمن و انما
يطرح عنه حصة
النقصان فلو ان

77. Two persons who are at the same time its pre-emptors purchase some property. It has a third pre-emptor also. After the purchasers have divided the house, the third pre-emptor appears, then he is entitled to dissolve their partition irrespective of the fact that it was effected by the decree of Court or by mutual agreement. This is according to the *Zakhira*. A person purchases a land for 100 *dirhams* and then digs out its soil which he sells for 100 *dirhams* thereafter the pre-emptor appears, and demands pre-emption. As regards such a case Shaikh-ul-Imām Abu Bakr Muḥammad bin Fazl says that the pre-emptor is entitled to take the land on payment of half of its price, that is, for 50 *dirhams*. The price will be divided between the value of the land as it was before the soil had been taken from it and the value of the soil after it has been dug out, and then a remission of the value of the soil accordingly will be made in favour of the pre-emptor ; but Kāzī Imam Ali Sūghdī holds that half of the original price of the land will not be remitted in favour of the pre-emptor, but so much of it will be remitted from the full price as is the actual loss to the pre-emptor, and hence

المشتري كبس الارض بعد ما رفع منه التراب فاعادها كما كانت قبل ان يحضر الشفيع ثم حضر الشفيع قال الشيخ الامام ابوبكر محمد بن الفضل يقال للمشتري رفع من الارض ما احدثت كذا في فتاوى قاضي خان -

if the vendee fills it up, and restores it to its original state, before pre-emption is demanded, and afterwards the pre-emptor appears, then Shaikh Imam Abu Bakr Muhammad bin Fazl holds that the vendee should be asked to remove all that by which he has filled the land. This is according to the *Fatāwā-i-Kazi Khan.*

٧٨ - ولو باع نصف دار من رجل ليس بشفيع وقاسمه بامر القاضي فقدم الشفيع و نصيب البائع بين دار الشفيع وبين نصيب المشتري فانه لاتبطل شفعته فان باع البائع نصيبه بعد القسمة قبل طلب الشفيع الشفعة الاولى ثم طلب الشفيع فانه ينظر ان قضى القاضي بالشفعة الاخيرة جعلها بينهما نصفين لان المشتري قد صار

78. If a person sells half of his house to a person who is not its pre-emptor, thereafter partitions it by the order of the Kazi, and it so happens that the share of the vendor intervenes between the house of the pre-emptor and the share of the vendee, thereafter the pre-emptor appears, then his right of pre-emption is not invalidated. Meanwhile, if the vendor sells his share after partition, but before the demand of pre-emption by the pre-emptor on the first sale, and thereafter the pre-emptor demands pre-emption, then it depends whether the Kazi decrees pre-emption on the second sale, for if so, then this share would be divided equally between the vendee and the pre-emptor because the vendee

جار النصيب البائع كالشفيع فاستويا فيه وان بدا فقضي بالاولي للاول قضي له بالا خيرة ايضالانه لم يبق المشتري الاول ملك كذا في محيط السرخسي - ذكر في المنتقي قال اذا اشتري دارا بالف درهم ثم باعها بالفين فعلم الشفيع بالبيع الثاني ولم يعلم بالاول فخاصم فيها فاخذ ها بالشفعة بالبيع الثاني بحكم الحاكم او بغير حكمة ثم علم بالبيع الاول فليس له ان ينقض ما اخذه و بطلت شفعته في البيع الاول وكذلك لوبا عها صاحبها بالف ثم ناقضه المشتري و ردّها ثم اشتراهامنه الشفيع بالفين ولا يعلم بالبيع الاول ثم علم

now has also become neighbour in the same way as the pre-emptor, to the share which is the subject matter of pre-emption, and so they are equal as regards their right of pre-emption ; but if the Kāzī decrees pre-emption on the first sale, then another decree of pre-emption will be given as regards the second sale in favour of the pre-emptor for now the first vendee will no longer be owner of that part of house. This is according to the *Muḥīṭ* of *Sarakhsī.* It is mentioned in the *Muntaqā* that if a person purchases a house for 1,000 *dirhams* and then he sells it for 2,000 *dirhams* thereafter the pre-emptor is informed of the second sale, and he being ignorant of the first sale,obtains the house in pre-emption on the second sale, and it is immaterial whether he takes in virtue of the decree of the Kāzī or not. Subsequently he hears of the first sale then he is not entitled to dissolve the decree and his right of pre-emption in the first sale has been invalidated. And similarly if an owner sells the house for 1,000 *dirhams* and they (vendor and vendee) rescind the contract and the vendee returns the house to the vendor, thereafter the pre-emptor purchases the house for 2,000 *dirhams* being

به لم يكن له ان ينقض شراءه كذا في المحيط ولو كان المشتري حين اشتراه بالف ناقضه البيع ثم اشتراه بالفين فاخذ الشفيع بالفين و لم يعلم بالبيع الاول ثم علم به لم يكن له ان ينقضه سواء كان بقضاء او بغير قضاء كذا في البدايع -

ignorant of the first sale, and afterwards he is informed of it, then he is not entitled to dissolve the contract of sale. This is according to the *Muḥīṭ*. If the vendee having purchased the house for 1,000 *dirhams* mutually dissolves the contract, and thereafter again purchases it for 2,000 *dirhams* and the pre-emptor pre-empts the house for 2,000, *dirhams* being ignorant of the first sale, but afterwards he is informed of it, then he cannot dissolve the contract of sale; it is immaterial whether he has obtained the house by the decree of the Kāzī or by mutual arrangement. This is according to the *Badāyi*'.

٧٩ - لو اشتراها بالف فزاده في الثمن الفا فعلم الشفيع بالفين ولم يعلم بالالف فان اخذ بالالفين بقضاء ابطلت الزيادة وعليه الف وان اخذها برضاء كان الاخذ بمنزلة شراء مبتدا فلم يبق حق الشفعة كذا في محيط السرخسي - ولو

79. If a vendee purchases the house for 1,000 *dirhams* but he augments the sale-consideration by 1,000 *dirhams* more, and the pre-emptor took the price to be 2,000 *dirhams*, being ignorant of its sale for 1,000 *dirhams*, then if the pre-emptor pre-empts the house for 2,000 *dirhams* under the decree of the Kazi, the augmentation becomes invalid, and he should pay only 1,000 *dirhams*, but if he takes the house by mutual arrangement, then the transfer is regarded as a sale

ولو اوصي المشتري لانسان كان للشفيع ان ينقض الوصية و ياخذ من الورثة والعهدة عليهم كذا في التاتار خانية - ولو اشترى قرية فيها بيوت واشجار ونخيل ثم انه باع الا شجار والبناء فقطع المشتري بعض الا شجار وهدم بعض البناء ثم حضر الشفيع كان له الارض وما لم يقطع من الا شجار وما لم يهدم من البناء وليس له ان ياخذ ما قطع ويطرح عن الشفيع حصة ما قطع من الشجر وما هدم من البناء كذا في فتاوى قاضي خان - ولو اشترى دارا فهدم بناء ها ثم بني فاعظم المنفعة فان الشفيع يا خذ ها بالشفعة ويقسم الثمن على

ab initio and the right of pre-emption becomes extinct. This is according to the *Muhit*-of-*Sarakhsi*. If the purchaser has bequeathed the property, then the pre-emptor is entitled to take the property from his heirs, legal representatives, on whom will rest the responsibilities of the contract. This is according to the *Tātār khāniyya*. And if a person purchases a village in which there are houses, and trees, date palms and thereafter he sells the trees and houses and the new purchaser cuts down some of the trees, and destroys some of the houses, thereafter the pre-emptor appears, then he is entitled to pre-empt the property the trees not already cut down and the houses not destroyed, and to a deduction from the price in respect of the trees that have been cut and the houses destroyed. This is according the *Fatāwā-i-Kazi Khan*. If a person purchases a house, pulls it down, and then rebuilds one of increased value on its site, then the pre-emptor has a right to pre-empt it, the price will be determined according to the value of the lands and the buildings as they were at the

قيمة الارض والبناء الذي كان فيها يوم اشترى ويسقط حصة البناء لان المشتري هو الذي هدم البناء وينقض المشتري بناء ها المحدث عندنا كذا في المبسوط -

time of purchase, and the purchaser may remove the new erected constructions.[1] This is according to the *Mabsūṭ*.

---

[1] Provided the pre-emptor is not willing to purchase it at the price of the materials. This appears not to be a case of a purchase in good faith, and it seems to me that this part of the law, in British India, is likely to be determined by section 51 of the Transfer of Property Act.

CHAPTER IX

How the Right of Pre-emption after it has accrued is rendered void.

80. The right of pre-emption is rendered void in two different modes after it has accrued; (1) *Ikhtiyari*, voluntary, (2) *Zaruri*, necessary. The first *Ikhtiyari* is of two kinds:—*Surrih*, express, and *dalalat* implied. When the pre-emptor uses such expressions as these, 'I have made my right of *Shufa'* void,' or 'I have waived my right of pre-emption,' or 'I have released you from my right of pre-emption,' or 'I have surrendered it to you,' and it is immaterial whether the pre-emptor is or is not aware of the sale, provided, however, that the sale has actually taken place, because when a person expressly surrenders his right of pre-emption, there is no question of ignorance, or knowledge on his part. The right of pre-emption is rendered void by implication, when any action on the part of the pre-emptor, indicates acquiescence in the sale to the purchaser, as for instance, when being informed of the

الباب التاسع

فيما يبطل به حق بعد ثبوته وما لا يبطل

٨٠ - ما يبطل به حق الشفعة بعد ثبوته نوعان اختياري و ضروري والاختياري نوعان صريح و ما يجري مجراه و دلالة اما الاول فنحو ان يقول الشفيع ابطلت الشفعة اواسقطتها او ابراتك عنها او سلمتها او نحو ذلك سواء علم بالبيع اولم يعلم بعد ان كان بعد البيع لان اسقاط الحق صريحا يستوي فيه العلم والجهل بخلاف الاسقاط من طريق الدلالة فانه لا يسقط حقه ثم الا بعد العلم واما الدلالة فهو ان يوجد من الشفيع

ما يدل على رضاه
بالعقد و حكمه
للمشتري نحو ما
اذا علم بالشراء
فترك الطلب على
الفور من غير عذر
او قام عن المجلس
او تشاغل عن
الطلب بعمل آخر على
اختلاف الروايتين
وكذا اذا ساوم
الشفيع الدار من
المشتري او ساله من
يوليه اياه اواستاجرها
الشفيع من المشتري
او اخذها مزارعة او
معاملة و ذلك كله
بعد العلم هكذا في
البدايع -ولو استودعه
او استوصاه اوساله
ان يتصدق بها
عليه فهو تسليم
هكذا في التاتار
خانية - ولو قال
المشتري او وكيلها

purchase, he refrains without sufficient excuse, from claiming his right by not demanding it immediately, or he rises from the meeting, or he pursues some other occupation ; this view is according to the two different reports of what is essential for the performance of the claim of pre-emption on hearing of the sale, and similarly if the pre-emptor has made an offer for the house to the purchaser, or has asked him to sell the house to him,[1] at the same price or he takes it from him on hire, or in *muzarat*, for purposes of cultivation and any such acts is done with knowledge of the purchase then the right of pre-emption will be deemed to have been extinguished. This is according to the *Badāyi'*. And if the pre-emptor asks the vendee to entrust the property sold to him, or to bequeath it to him, or give it to him in charity *sadqaḥ*. These acts are also deemed sufficient to invalidate the right of pre-emption. This is according to the *Tātār Khāniyya*. If the vendee says 'I

[1] Thus acknowledging the sale.

بكذا فقال الشفيع
نعم فهو تسليم
هكذا في الذخيرة -

am prepared to sell this house to you, and the pre-emptor says 'Yes,' this also amounts to the surrender of the right of pre-emption.[1] This is according to the *Zakhirah*.

٨١ - اما الضروري
فنحو ان يموت الشفيع
بعد الطلبتين قبل
الاخذ بالشفعة فتبطل
شفعته و هذا عندنا
و لا تبطل بموت
المشتري و للشفيع
ان ياخذ من
وارثه كذا في
البدايع -

81. The right of pre-emption is rendered void *Zururi*, necessarily, if the pre-emptor dies after the two demands, and before taking possession of the property; then according to our jurists the right is extinguished. However, the right of pre-emption is not rendered void by the death of the vendee and according to all jurists the pre-emptor can, assert his right, and take the property from the heirs of the vendee. This is according to the *Badāyi'*.

٨٢ - تسليم الشفعة
قبل البيع لا يصح
و بعده صحيح علم
الشفيع بوجوب
الشفعة او لم يعلم
و علم من اسقط اليه
هذا الحق او لم

82. The surrender of the right of pre-emption before the sale is not valid, but if made after the sale it is valid, irrespective of the fact whether the pre-emptor is aware of the existence of his right of pre-emption or not, and it is immaterial whether the person in whose favour the right of pre-emption is surrendered

[1] Because he thereby admits the validity of the sale to the vendee.

يعلم كذا في المحيط -

٨٣ - اذا قال المشتري للشفيع انفقت عليها كذا في بنائها وانا اوليّلها بذلك وبالثمن فقال نعم فهو تسليم منه كذا في المبسوط- ذكر مسائل تسليم الشفعة في الباب العاشر من كتاب الصلح ولا يصح تسليم الشفعة بعد ما اخذ الدار بالشفعة ولا يصح التسليم في الهبة بعوض قبل القبض كذا في التاتار خانية - واذا سلم الشفيع الشفعة في هبة بعوض بعد التقابض ثم اقر البائع و المشتري انها كانت بيعا بذلك العوض لم

is aware of it or not. This is according to the *Muḥīṭ*.

83. And if the vendee says to the pre-emptor 'I have spent so much on the buildings of this house and I am prepared to sell it to you on payment of its price and my expenses,' and if the pre-emptor says 'Yes,' then it is regarded as the surrender of the right of pre-emption.[1] This is according to the *Mabsūṭ*. The problems of the surrender of the right of pre-emption are mentioned in the chapter X of the Book of *Sulha*. The surrender of the right of pre-emption is useless after the house has been actually pre-empted and in the case of *Hiba-bi'Shartil-'iwaz* before possession of the properties has been taken, it is useless to surrender the right of pre-emption. It is so mentioned in the *Tātār Khāniyya*. And if the pre-emptor has surrendered the right of pre-emption in *Hiba-bi-Shartil-'iwaz* after possession has been interchanged, and thereafter the vendor and vendee affirm that it was not a *Hiba* but a sale for consideration, then the pre-emptor is not entitled to

[1] Because he thereby admits the sale.

تكن للشفيع فيها
الشفعة وان سلمها
في هبة بغير عوض
ثم تصادقا انها
كانت بشرط عوض
او كانت بيعا
فللشفيع ان ياخذها
با لشفعة و اذا
وهب رجل دارا
علي عوض الف
درهم فقبض احد
العوضين دون الآخر
ثم سلم الشفيع
فهو باطل حتي
اذا قبض العوض
الاخر كان له ان
ياخذ الدار بالشفعة
لانه اسقط حقه قبل
الوجوب فالهبة
بشرط العوض انما
يصير كالبيع بعد
التقابض و تسليم
الشفعة قبل تقرر
سبب الوجوب باطل
كذا في المسبوط -
فاذا وهب الشفيع
الشفعة او باعها
من انسان لا
يكون تسليما
هكذا ذكر في

the right of pre-emption. And if he has surrendered the right of pre-emption in *Hiba* without return, thereafter the parties affirm, that it was *Hiba-bi-Shartil-'iwaz* (gift with return), or that it was a sale, then the pre-emptor will be entitled to the right of pre-emption. And if a person makes a gift of his house to another in exchange of 1000 *dirhams* and one of the subjects of exchange has been taken possession of, thereafter the pre-emptor surrenders the right, then it is useless, thus when the other subject of exchange will be taken possession of, the pre-emptor will become entitled to pre-empt the house, for the right of pre-emptioned was surrendered before it had accrued in his favour, because *Hiba-bi Shartil-'iwaz* is transformed into a sale after possession is actually interchanged, and the surrender of the right of pre-emption before the cause of pre-emption has accrued is void. This is according to the *Mabsūṭ*. And if the pre-emptor makes a gift or sells his right of pre-emption to another person then this does not amount to a surrender of the right of pre-emption. This is according to the Fatawa of Ahl-i-Samarkand ; but Shamsul Ilamah Sarakhsī has described in *Sharḥ*

فتاوى اهل سمر قند و ذكر شمس الائمة السرخسي في شرح كتاب الشفعة قبيل باب الشهادة اذا باع الشفعة كان ذلك تسليما للشفعة ولا يجب المال وهو الصحيح وقد ذكر محمد رح في شفعة الجامع ما يدل عليه كذا في المحيط -

Kitāb-al-Shuf'a in chapter of *Shahādat* that if the pre-emptor sells the right of pre-emption, then it will be deemed as the surrender of the right of pre-emption and the sale consideration will not be due in lieu of it. This view is correct. And Imam Muhammad in *Shuf'atul-Jām'i* also appears to approve of this view. This is according to the *muhīt*.

٨٣ - اذا سلم الشفيع الشفعة ثم زاد بعد ذلك في المبيع عبدا او امة كان للشفيع ان ياخذ الدار بحصتها من الثمن واذا سلم الشفيع الشفعة ثم حط البائع من الثمن شيئا فله الشفعة لان الحط يلتحق باصل العقد كما لو خبر بالبيع بالف وسلم فاذا البيع خمسمائة

84. If after the pre-emptor has surrendered his right of pre-emption, the vendor adds a slave male or female to the house sold, then the pre-emptor will be entitled to pre-empt the house on paying its corresponding value. And if the pre-emptor has surrendered his right of pre-emption, thereafter the vendor reduces the price, then the pre-emptor will again be entitled to avail himself of his right of pre-emption, because the abatement is deemed to be a part of the original contract of sale, as for instance, if the pre-emptor receives information that the sale was for 1000, *dirhams* and he surrendered his right of pre-emption,

while the sale was really for 500 *dirhams* then the right of pre-emption is revived. This is according to the *Zakhīrah*. And if the pre-emptor says "I surrender my right of pre-emption in this mansion," the surrender is valid though no person in particular is mentioned, and in like manner, if he should say to the vendor 'I have surrendered my right of pre-emption in this mansion to you,' the mansion being still in the vendor's possession, the surrender will be valid. This is according to the *Muhīt*. If the pre-emptor should say to the vendor after he has delivered the mansion to the vendee, 'I have surrendered the right of pre-emption in this mansion to you,' the surrender will still be valid according to the doctrine of *Istihsān*. While, if he should say to the vendor, "I have surrendered it for your sake," or "on account of you," the surrender will be valid according to *Qiās* as well as *Istihsān*. This is according to the *Fatāwāi-i-Kazi Khān*.

كذا في الذخيرة - اذا قال الشفيع سلمت شفعة هذه الدار كان تسليما صحيحا وان لم يعين احدا وكذلك لو قال للبائع سلمت لك شفعة هذه الدار والدار في يد البائع كذا في المحيط - ولو قال للبائع بعد ما سلم الدار الي المشتري سلمت الشفعة لك صح استحسانا ولو قال سلمت الشفعة بسببك اولاجلك صح تسليمه قياسا واستحسانا كذا في فتاوي قاضي خان -

85. And if the vendee is the agent for another person in the sale of the house, and the pre-emptor says "I have surrendered my right of pre-emption in this house" and he did

٨٥ - واذا كان المشتري وكيلا من جهة غيره . بشراء الدار فقال الشفيع سلمت شفعة هذه

الدار ولم يعين
احدا كان تسليما
صحيحا وكذلك
لو قال للوكيل
سلمت لك شفعة
هذه الدار والدار
في يدا لوكيل
صح التسليم قياسا
واستحسانا ولو قال
ذلك للوكيل بعد
مادفع الدار الي
الموكل صح التسليم
استحسانا واذا كان
المشتري وكيلا من
غيره بالشراء فقال له
الشفيع سلمت لك
شفعة هذه الدار
خاصة دون غيرك
كان هذا تسليما
صحيحا للآمر
كذا في المحيط -
ولو قال الاجنبي
سلمت شفعة هذه
الدار سقطت
كذا في محيط
السرخسي - ولو قال
الشفيع لاجنبي
ابتداء سلمت شفعة
هذه الدار لك

not mention any person, then the surrender will be valid. And similarly if the pre-emptor should say to the agent, "I have surrendered my right of pre-emption in this house to you," while the house is in the possession of the agent, the surrender will be valid according to the *Qiās* and *Istehsan* and if the pre-emptor says the same to the agent after he had delivered possession of the house to the principal, then the surrender will be valid according to *Istehsan.* And if the vendee is an agent for another person in the sale. and the pre-emptor says to him, "I have surrendered the right of pre-emption in this house to you specially excluding all others, this will amount to a valid surrender by the pre-emptor in favour of the principal. This is according to the ***Muhīt***. And if the pre-emptor were to say to a stranger, "I have surrendered the right of pre-emption in this mansion," then there will be a surrender. This is according to the *Muhīt of Sarakhsi*. But if the pre-emptor should say to a stranger at the beginning, "I have surrendered the right of pre-emption in this house to you," or "I have withdrawn

او قال اعرضت عنها
لك لا يصح تسليمه
ولا تبطل شفعة
قياسا واستحسانا
و لو قال لاجنبي
سلمت الشفعة للموكل
او قال و هبتها
للموكل لا او قال
اعرضت عنها للموكل
لاجلك و شفاعتك
صح تسليمه للامر
وتبطل شفعة كذا
في فتاوى قاضي
خان - ولو قال
الشفيع اجنبي سلم
الشفعة للموكل
فقال قد سلمتها
لك او وهتبها او
اعرضت عنها كان
تسليما في
الاستحسان لان
الاجنبي اذا خاطبه
بالتسليم لزيد
فقال قد سلمتها
لك فان هذا كلام
خرج مخرج الجواب
فصار كانه قال
سلمتها له لاجلك
ان قال الشفيع
لما خاطبه الاجنبي

the right of pre-emption in respect of you" the surrender will not be valid and his right of pre-emption will not be annulled both, according to the doctrines of *Qiās* and *Isteḥsan*; but if the pre-emptor should say to the stranger, "I have given up the right of pre-emption in favour of the principal," or he should say "I hav ... gift of the right to the ... "I have withdrawn my ri ... ion in the house in favo of the principal for your sake," then the surrender will be valid in favour of the principal and the right of pre-emption will be invalidated. This is according to the *Fatāwā-i-Kāzi Khan*. If a stranger should say to the pre-emptor, "Surrender the right of pre-emption in favour of the principal," thereupon the pre-emptor says, "I have surrendered the right for your sake," or "I have made a gift of the right for your sake," or "I have waived my right for your sake," then it will be a valid surrender in favour of the principal according to *Isteḥsan*; because when the stranger requested the pre-emptor to surrender the right in favour of the principal, and the pre-emptor said, "I have surrendered the right of pre-emption to you,"

these words were uttered in response to the request, and therefore they mean, "I have surrendered the right of pre-emption in favour of the principal for your sake." But if the pre-emptor were to say, without being addressed by the stranger, "I have surrendered the right of pre-emption in this mansion in respect of you," or "I have made a gift of the right of pre-emption to you," or I have sold the right to you," all this would not amount to a surrender in favour of the principal, because these statements of the pre-emptor were mere spontaneous utterances. This is according to the *Sirajal-Wahaj*. And if the stranger should say to the pre-emptor, "I shall compound your claim for consideration on condition that you will surrender the right of pre-emption for the principal," thereupon the pre-emptor surrendered it, then the surrender will be regarded as valid but the consideration will not be legally due. And if the stranger should say, "I compound your claim for so much consideration on condition that you will entitle me to enforce the right of pre-emption, then such a compromise is void ; and the pre-emptor's right of pre-emption remains intact. This is according to the *Tātār Khāniyya*. And

قد سلمت لك شفعة
هذه الدار وهبت
لك شفعتها او بعتها
منك لم يكن ذلك
تسليما لان هذا
كلام مبتداء فلا
نيطوي تحت الجواب
لا ستقلاله بنفسه
فلا يكون تسليما
كذا في السراج
الوهاج - واذا قال
اجنبي الشفيع
اصالحك علي كذا
علي ان تسلم
الشفعة فسلم كان
تسليما صحيحا
ولايجب المال ولو
قال اصالحك علي
كذا علي ان
تكون الشفعة لي
كان الصلح باطلا
وهو علي شفعة
كذا في التاتار
خانية - ولو ان
اجنبيا قال للشفيع
اصالحك علي كذا
من الدراهم علي
ان تسلم الشفعة
ولم يقل لي فقبل
الشفيع لا يجب

المال علي الاجنبي ولا تبطل شفعة وان قال الشفيع للبائع سلمت لك بيعك او قال لامشتري سلمت لك شرائك بطلت شفعتها وان قال لاجنبي سلمت ذلك شراء هذه الدار لم يكن ذلك تسليما ولا تبطل شفعة كذا في فتاوى قاضي خان -

if the stranger should say to the pre-emptor, "I shall compound your claim for so many *dirhams*, as consideration on condition that you will surrender the right of of pre-emption," and he did not say 'to me' or 'for me'; and the pre-emptor accepted the proposal, then the stranger is not liable for the consideration and the pre-emptor's right is also not annulled. And if the pre-emptor should say to the vendor, "I have surrendered to you your sale." or to the vendee, "I have surrendered to you your purchase," then his right of pre-emption will be annulled; but if he should say to a stranger, "I have surrendered to you the purchase of this house," then there will be no surrender, nor will the right of pre-emption become void. This is according to the *Fatāwā-i-Kāzī Khan*.

٨٦ - تعليق ابطالها بالشرط جائز حتي لو قال سلمها ان كنت اشتريت لاجل نفسك فان كان اشتراه بغيره لا تبطل لانه اسقاط والاسقاط يحتمل التعليق كذا في الوجيز للكروري -

86. The right of pre-emption may be lawfully suspended on a condition, e.g., if the pre-emptor says, "I surrender my right if you have purchased it for yourself," while the sale in fact, has been for another person, then the right of pre-emption is not extinguished; for its *Isqāṭ*, surrender, is suspended on a condition. This is according to the *Wajīz of-Kardarī*. If the pre-emptor should say

لوقال الشفيع للبائع
سلمت لك الشفعة
ان كنت بعتها
من فلان لنفسك
فكان باعها لغيره
لم يكن ذلك تسليما
وفي فتاوي الفقيه
ابي الليث ؒ اذا
قال الشفيع للمشتري
سلمت لك شفعة
هذه الدار فاذا
هو قد اشتراها
لغيره فهو على
شفعة وفي فتاوى
الفضلي ان هذا تسليم
للآمر والمختار
المذكور في فتاوى
ابي الليث هكذا
ذكر الصدر الشهيد
وفي الحاوي اذا
قال المشتري اشتريتها
لنفسي فسلم الشفيع
الشفعة ثم ظهر انه
اشتراها لغيره قال
محمد ؒ بطلت شفعة
وقال ابو حنيفة ؒ
لا تبطل كذا في
المحيط - واذا سلم
الجار الشفعة مع
قيام الشريك صح
تسليمه حتى لو
سلم الشريك بعد

to the vendor, "I have surrendered the right of pre-emption for your sake, if you have sold the house to such and such person." While in reality the house has been sold to some one else, then it will not be a valid surrender. And it is mentioned in the *Fatāwā-i-'Ābu Lais* that if the pre-emptor should say to the vendee, "I have surrendered the right of pre-emption in this house for you only," and the vendee had purchased the house for some one else, then the pre-emptor will retain his right of pre-emption, and it is mentioned in the *Fatāwā* of *Fazli* that this amounts to a surrender in favour of the principal. But the better opinion is the view expressed in the *Fatāwā-i-'Ābu Lais*. And Sadral-Shahid says and it is also given in the *Havi* that if the vendee says to the pre-emptor, "I have purchased it for myself," and the pre-emptor surrenders his right, afterwards it transpires that the vendee had purchased it for somebody else, nevertheless Imām Muḥammad holds that the pre-emptor's right has been rendered void, whereas Imām Abu Hanifa holds that it is not void. This is according to the *Muḥīṭ*. And if the *shafī'-i-jar* has surrendered his right while there is a *shafī'-i-sharīk*, then such

المال علي الاجنبي ولا تبطل شفعة وان قال الشفيع للبائع سلمت لك بيعك او قال لامشتري سلمت لك شرائك بطلت شفعتها وان قال لاجنبي سلمت ذلك شراء هذه الدار لم يكن ذلك تسليما ولا تبطل شفعة كذا في فتاوى قاضي خان -

if the stranger should say to the pre-emptor, "I shall compound your claim for so many *dirhams*, as consideration on condition that you will surrender the right of of pre-emption," and he did not say 'to me' or 'for me'; and the pre-emptor accepted the proposal, then the stranger is not liable for the consideration and the pre-emptor's right is also not annulled. And if the pre-emptor should say to the vendor, "I have surrendered to you your sale," or to the vendee, "I have surrendered to you your purchase," then his right of pre-emption will be annulled; but if he should say to a stranger, "I have surrendered to you the purchase of this house," then there will be no surrender, nor will the right of pre-emption become void. This is according to the *Fatāwā-i-Kāzī Khan.*

٨٦ - تعليق ابطالها بالشرط جائز حتى لو قال سلمها ان كنت اشتريت لاجل نفسك فان كان اشتراه بغيره لا تبطل لانه اسقاط والاسقاط يحتمل التعليق كذا في الوجيز للكروري -

86. The right of pre-emption may be lawfully suspended on a condition, e.g., if the pre-emptor says, "I surrender my right if you have purchased it for yourself," while the sale in fact, has been for another person, then the right of pre-emption is not extinguished; for its *Isqāṭ*, surrender, is suspended on a condition. This is according to the *Wajīz of-Kardarī.* If the pre-emptor should say

لوقال الشفيع للبائع
سلمت لك الشفعة
ان كنت بعتها
من فلان لنفسك
فكان باعها لغيره
لم يكن ذلك تسليما
وفي فتاوي الفقيه
ابي الليث رح اذا
قال الشفيع للمشتري
سلمت لك شفعة
هذه الدار فاذا
هو قد اشتراها
لغيره فهو على
شفعة وفي فتاوى
الفضلي ان هذا تسليم
للآمر والمختار
المذكور في فتاوى
ابي الليث هكذا
ذكر الصدر الشهيد
وفي الحاوي اذا
قال المشتري اشتريتها
لنفسي فسلم الشفيع
الشفعة ثم ظهر انه
اشتراها لغيره قال
محمد رح بطلت شفعة
وقال ابو حنيفة رح
لا تبطل كذا في
المحيط - واذا سلم
الجار الشفعة مع
قيام الشريك صح
تسليمه حتى لو
سلم الشريك بعد

to the vendor, "I have surrendered the right of pre-emption for your sake, if you have sold the house to such and such person." While in reality the house has been sold to some one else, then it will not be a valid surrender. And it is mentioned in the *Fatāwā-ī-'Ābu Lais* that if the pre-emptor should say to the vendee, "I have surrendered the right of pre-emption in this house for you only," and the vendee had purchased the house for some one else, then the pre-emptor will retain his right of pre-emption, and it is mentioned in the *Fatāwā* of *Fazli* that this amounts to a surrender in favour of the principal. But the better opinion is the view expressed in the *Fatāwā-i-'Ābu Lais*. And Sadral-Shahid says and it is also given in the *Havi* that if the vendee says to the pre-emptor, "I have purchased it for myself," and the pre-emptor surrenders his right, afterwards it transpires that the vendee had purchased it for somebody else, nevertheless Imām Muḥammad holds that the pre-emptor's right has been rendered void, whereas Imām Abu Hanifa holds that it is not void. This is according to the *Muḥīṭ*. And if the *shafī'-i-jar* has surrendered his right while there is a *shafī'-i-sharīk*, then such

ذلك شفعته لا يكون
للجار ان ياخذ
الشفعة كذا في
الذخيرة-واذاوجبت
الشفعة للعبد الماذون
فسلمها فهو جائز
ان كان عليه دين
او لم يكن عليه
دين وان سلمها
مولاه جاز ان لم
يكن عليه دين
وان كان عليه
دين لم يجز تسليم
المولى عليه كذا
في المبسوط - ولا
يجوز تسليمه بعد
الحجر كذا
في التاتار خانية -
وتسليم المكاتب
شفعة جائز ايضا
كذا في المبسوط -

a surrender is valid. So that, if thereafter the *shafī'-i-sharīk* were to surrender his right, the *shafī'-i-jār* cannot resume the right of pre-emption. This is according to the ***Zakhira.*** And when the right of pre-emption accrues in favour of a slave *mazun*,[1] and he surrenders his right, it is lawful, irrespective of the fact whether he were in debt or not. And if his master surrenders the right of pre-emption, then it will also be lawful provided the slave *māzūn* is not in debt, for if he were in debt, then the master's surrender will not be lawful as against the right of the slave to pre-empt the property.[2] This is according to the *Mabsūt.* And the surrender of the right by the slave after revocation of his freedom is not valid. This is according to the *Tātār Khāniyya* and similarly the surrender of his right of pre-emption by a slave *mukātib*[3] is lawful. This is according to the *Mabsūt.*

---

[1] A slave permitted by his master to take part in the purchase and sale of things.

[2] It seems that it is profitable for the slave to pre-empt the property.

[3] A slave who is entitled to purchase his freedom from his master at a stipulated sum.

٨٧ - ولو اخبر بالبيع بقدر من الثمن او جنس منه او من فلان فسلم فظهر خلافه هل يصح تسليمه فالاصل في جنس هذه المسائل ان ينظر ان كان لا يختلف غرض الشفيع في التسليم صح التسليم وبطلت شفعته وان كان يختلف غرضه لم يصح وهو على شفعة كذا في البدائع - ولو اخبر ان الثمن الف درهم مسلم ثم تبين ان الثمن مائة دينار قيمتها الف درهم او اقل او اكثر فعندنا هو على شفعة ان كانت قيمتها اقل من الالف والا فتسليمه صحيح كذا في المبسوط - و اذا قيل له ان المشتري

87. If the pre-emptor surrenders his right on misinformation as to the amount or the kind of the price, or the person to whom the property has been sold, it is to be considered whether his *gharaz*, object, would or would not have changed if he were correctly informed; and if it would not have changed then the surrender will be valid, and the right will be extinguished, but if it would have changed, then the surrender will not be valid, and the right could still be claimed. This is according to the *Badāyi'*. If the pre-emptor be informed that the price is one thousand *dirhams*, and he therefore surrenders his right, subsequently he ascertains that it was one hundred *dinars*,[1] then he will be entitled to claim his right provided the value of one hundred *dinars* were less than that of one thousand *dirhams*; for if such is not the case, then the surrender will be deemed to be valid. This is according to the *Mabsūṭ*. If the pre-emptor be informed that the vendee is such and such a person, and he therefore surrenders his right, subsequently he ascertains that the vendee is a different person, then the right of

[1] A *dinar* is a gold coin, and a *dirham* is a silver coin.

فلان فسلم الشفعة ثم علم انه غيره فله الشفعة واذا قيل له ان المشتري زيد فسلم ثم علم انه عمر ووزيد صح تسليمه لزيد وكان له ان ياخذ نصيب عمر و كذا في الجوهرة النيرة -

٨٨ - ولو اخبر ان الثمن الف فسلم فاذا الثمن اقل من ذلك فهو علي شفعته ولو كان لثمن الفا او اكثر فلا شفعة كذا في الذخيرة - ولو اخبر ان الثمن شئي مما يكال او يوزن فسلم الشفعة فاذا الثمن صنف آخر مما يكال او يوزن فهو علي شفعته علي كل حال سواء كان ماظهر مثل ما اخبره او اقل او اكثر من حيث القيمة كذا في المحيط -

pre-emption will revive. If the pre-emptor be informed that the vendee was A, thereupon he surrenders his right, but it turns out that A and B both had purchased it, then the surrender will be valid as regards the share of A, and the pre-emptor will be entitled to assert his right as regards the share of B. This is so according to the *Jawhara Nairah*.

88. And if the pre-emptor be informed that the price is one thousand *dirhams*, thereupon he surrenders his right; but subsequently he ascertains the price to be less, then the pre-emptor's right of pre-emption will revive; but if the actual price is ascertained to be one thousand *dirhams* or more, then the surrender of the right of pre-emption remains effective. This is according to the *Zakhīra*. If the pre-emptor be informed that the price was a certain commodity estimated by weight or measure of capacity, and he thereupon surrenders his right, while in fact, the price was a different commodity estimated by weight or measure of capacity, then the right revives under all circumstances, whether the price was equal to or more or less than that mentioned to him. This is according to the *Muḥīṭ*.

٨٩ - ولو اخبر
ان الثمن شئي من
ذوات القيم فسلم
ثم ظهر انه كان
مكيلا او موزونا او
اخبره ان الثمن
الف درهم فاذا
هو مكيل او موزون
فهو علي شفعته
علي كل حال كذا
في خزانة المفتين -
و لو اخبر
ان الثمن شئي
من ذوات القيم
فسلم ثم ظهر انه
شئي آخر من ذوات
القيم بان اخبر
ان الثمن دار فاذا
الثمن عبد فجواب
محمد رح في الكتاب
انه علي شفعته من
غير فصل قال شيخ
الاسلام المعروف
بخواهر زاده هذا
الجواب صحيح
فيما اذا كان قيمة
ماظهر اقل من
قيمة ما اخبر به وغير
صحيح فيما اذا كان
قيمة ماظهر مثل

89. And if the pre-emptor be informed of the price of a certain commodity, *Zawātul Qiyam*, and thereupon he surrenders his right, when in fact, it turns out to be a commodity estimated by weight or measure of capacity, then under all these circumstances, his right to pre-empt revives. This is according to the *Khizanat-al-Muftīn*. And if the pre-emptor be informed of the price of a commodity *Zāwatul Qiyam*, and he surrenders his right, when in fact, it turns out to be a different commodity *Zawātul Qiyam*, *e.g.*, he was told that the price was a mansion, while in fact, it was a slave, then according to Imām Muḥammad the pre-emptor retains his right. Shaikh Islām-ul-Khwāhir Zāda says that this view of Imām Muḥammad is accepted in the case where the price is proved to be less than that was told to the pre-emptor; but the view is not accepted, if the price turns out to be equal to that which was told to the pre-emptor or more than that. And if the pre-emptor be informed that the price is a slave of the value of one thousand *dirhams*, or something, *Zawātul Qiyam*, and in

[1] *Zawātul Qiyam* means things having some value.

قيمة ما اخبربه او اكثر ولو اخبر ان الثمن عبد قيمته الف او ما اشبه ذلك من الا شياء التى هي من ذوات القيم ثم ظهر ان الثمن دراهم او دنانير فجواب محمد رح انه علي شفعته من غير فصل وبعض مشائخنا رح قالوا هذا الجواب محمول علي ما اذا كان ما ظهر اقل من قيمة ما اخبر ما اذا كان مثل قيمة ما اخبرا و اكثر فلا شفعة له ومنهم من قال هذا الجواب صحيح علي الا طلاق بخلاف المسئلة الاولي ولو اخبر ان الثمن عبد قيمته الف فظهر ان قيمته اقل من الالف فله الشفعة وان ظهر ان قيمته الف او اكثر فلا شفعة ولو اخبر

fact the price was in *dirhams* or *dinars* then the view of Imām Muḥammad, viz., that the pre-emptor retains his right of pre-emption is correct. And some of our jurists hold that this view of Imām Muḥammad is applicable to a case, where the price turns out to be less than that which was told to the pre-emptor; but if the price happens to be equal or more than what was told to the pre-emptor, then this view is not applicable, however, some jurists hold that even in this case this view will be applicable. And if the pre-emptor be informed that the price is a slave of the value of one thousand *dirhams*, when in fact, it was less than one thousand *dirhams*, then the pre-emptor retains his right; but if the price was actually one thousand *dirhams* or more, then the right will be annulled. And if the pre-emptor be informed that the price is one thousand *dirhams*, whereupon he relinquishes his right, when in fact, it turns out that the price was a commodity, *Zawātul Qiyam*, then relinquishment is valid except where the value of the commodity is proved to be less than one thousand *dirhams*. This is according to the

ان الثمن الف
فسلم ثم ظهر ان
الثمن شئي من
ذوات القيم فلا
شفعة له الا اذا
كان قيمة الثمن
اقل من قيمة الف
درهم كذا في
المحيط - ولو اخبر
بشراء نصف الدار
فسلم ثم ظهر
ان المشتري اشتري
الكل فله الشفعة
ولو اخبر بشراء
الكل فسلم ثم
ظهر انه اشتري
النصف فلا شفعة
له قال شيخ
الاسلامؒ في شرحه
هذا الجواب محمول
علي ما اذا كان
ثمن النصف مثل
ثمن الكل بان
اخبر انه اشتري
الكل بالف فسلم
ثم ظهر انه اشتري
النصف بالف اما
اذا اخبر انه اشتري
الكل بالف ثم
ظهر انه اشتري
النصف بخمسمائة
يكون علي شفعته
هكذا في الذخيرة -

Muḥīṭ. If the pre-emptor be informed of the sale of half the mansion, and thereupon surrenders his right, whereas in fact, the vendee has purchased the whole mansion, then the right of pre-emption will revive ; but if the pre-emptor be informed of the sale of the whole mansion, and thereupon relinquishes his right, whereas, in fact, the vendee had purchased only half the mansion, then the relinquishment will remain valid. But Shaikh al Islām has said in his *Sharha* that this view will be applicable if the price of half the mansion were the same, *e.g.*, the pre-emptor is informed that the vendee purchased the whole mansion for one thousand *dirhams* thereupon he surrenders his right, whereas, the vendee had purchased only half the mansion for one thousand *dirhams*, then in this case the relinquishment remains valid ; however if the pre-emptor be informed that the vendee purchased the whole for one thousand *dirhams*, and it turned out that he purchased the half for 500 *dirhams*, then the right of pre-emption will revive. This is according to the *Zakhīra.*

٩٠-ولوسلم الشفعة
في النصف بطلت
في الكل ولو طلب
نصف الدار بالشفعة
هل يكون ذلك
تسليما منه للشفعة
في الكل اختلف
فيه ابو يوسف
و محمدرح قال
ابو يوسفرح لايكون
تسليما كذا في
البدائع-وهوالاصح
لان طلب التسليم
النصف لايكون
تسليما للباقي لا
صريحا ولا دلالة
كذا في محيط
السرخسي - ولو ان
الشفيع باع نصف
داره او ثلثها او
اكثر من ذلك بعد
ان يبقي منها شئ،
وما باع شائع فله
الشفعة بمابقي كذا
في السراج الوهاج-

90. And if the pre-emptor relinquishes his right of pre-emption in half the mansion, then his right is annulled in the whole. If the pre-emptor claims half the mansion in pre-emption, then whether it is to be regarded as the surrender by him of his right of pre-emption in the whole mansion or not is held differently by Imām Abu Yusuf and Imām Muḥammad,[1] the former holds that it does not amount to surrender of the right in the whole mansion. This is according to the *Badāyi'*. And the view of Imām Abu Yusuf is better because the demand of the right of pre-emption in half the mansion, does not amount either expressly or by implication to surrender of the right by the pre-emptor in the remaining half of the mansion. This is according to the *Muḥīṭ* of *Sarakhsī*. And if the pre-emptor has sold half the mansion by reason of which he claims pre-emption, or one third of it or more, but some portion of it still remains with him, then he retains his right of pre-emption by reason of this remaining portion. This is according to the *Sirajal-Wahhāj*.

[1] The view of Imām Muḥammad seems to be followed by the Indian High Courts, but they do not refer to his authority at all.

٩١ - الشفيع اذا ادعى رقبة الدار المشفوعة انها له لا بالشفعة تبطل شفعته وان طلب الشفعة ثم ادعى رقبة الدار المشفوعة انها له لاتسمع دعواه كذا في فتاوي قاضيخان - وان صالح من شفعته على عوض بطلت الشفعة ورد العوض لان حق الشفعة ثبت بخلاف القياس لدفع الضرر فلا يظهر ثبوته في حق الاعتياض ولايتعلق اسقاطه بالجائز من الشرط فبالفاسد اولى فلو قال الشفيع اسقطت شفعتي فيما اشتريت على ان تسقط شفعتك فيما اشتريت فانه تسقط شفعته وان لم يسقط

91. If the pre-emptor claims the ownership of a certain mansion subject of pre-emption to be his own property, then there exists no right of pre-emption and if he has demanded pre-emption, thereafter he claims the mansion to be his own property, then his suit can not be decreed.[1] This is according to the *Fatawa-i-Kazi Khan*. If the pre-emptor has compounded his right for something *'iwaz*, then the right is void, and the *'iwaz* the subject of exchange must be returned; because the right of pre-emption is allowed with a view to avoid injury and therefore it is construed strictly by the doctrine of *Qias*. And further, the *Isqāt* of *Shuf'a*, the surrender of the right of pre-emption, cannot be suspended on a condition, even though the condition were lawful; *e.g.*, If the pre-emptor says to the purchaser, 'I will waive my right of pre-emption in the house that you have purchased if you will waive your right of pre-emption in the house that I have purchased,'' now if the pre-emptor waives his right of pre-emption

[1] It is however possible to make an alternative claim of ownership in the suit of pre-emption.

المشتري شفعته فيما اشتري الشفيع و اسقاط الشفعة بالعوض المالي شرط فاسد لانه غير ملائم لانه اعتياض عن مجرد الحق في المحل وهو حرام ورشوة هكذا في الكافي -

while the purchaser does not do so on his part in respect of the property purchased by the pre-emptor, then the pre-emptor loses his right, because the *Isqāṭ* of *Shufa'* in lieu of exchange of property was a *fāsid*, invalid condition, and similarly it would be much more so if the condition were unlawful, *Harām*, condemnable. This is according to the *Kāfi*.

٩٢ - وان كان الشفيع شريكا وجارا فباع نصيبه الذي يشفع فيه كان له ان يطلب الشفعة بالجوار كذا في البدائع - سئل ابو بكر رحمه الله عمن سلم علي المشتري ثم طلب الشفعة قال تبطل شفعته كذا قال ليث بن مشاور قال ابراهيم بن يوسف رحمه الله لا تبطل روي عن محمد رحمه الله و به ناخذ كذا في الحاوي للفتاوى - و هو المختار كذا في الخلاصة والمضمرات -

92. If the pre-emptor were both a *sharik* (partner) and a *jar* (neighbour) and he sells the share by reason of which his right in the *sharik's* capacity could be established, nevertheless he may enforce his claim of pre-emption on the ground of neighbourhood. This is according to the *Badayi'*. Shaikh Abu Bakr was asked about the case of a pre-emptor who saluted the vendee and thereafter claimed his right of pre-emption; he replied, that thereby the right was annulled, and a similar view is held by Lais ibn Mushāwir. But Ibrahim bin Yusuf observes that the right of pre-emption is not extinguished, as held by Imām Muḥammad, and is accepted by all of us. This is according to the *Hāwī*, and is the best view, it is also according to the *Khulāsa* and *Muzmarāt*.

ولو كان المشتري واقفا مع الابن فسلم الشفيع علي ابن المشتري بطلت شفعته بخلاف ما اذا سلم علي المشتري فان سلم علي احدهما بان قال السلام عليك ولا يدري علي من سلّم سئل الشفيع انه سلم علي الابن او علي الاب فان قال علي الاب لا تبطل شفعته وان قال علي الابن تبطل شفعته وان احتلفا فقال المشتري سلمت علي ابني وقد بطلت شفعتك وقال الشفيع سلمت عليك فالقول قول الشفيع كذا في الذخيرة – ولو اخبر ببيع الدار فقال الحمد لله فقد ادعيت شفعتها او سبحان الله فقد ادعيت شفعتها فهو علي شفعته في رواية محمد[7] كذا

However if the vendee was standing with his son besides him, and the pre-emptor salutes first the vendee's son, then his right will be extinguished, whereas if he had saluted the vendee, he will retain his right; but if he salutes thus saying "*As-salām A'laikum*" (Peace be on you) and it is not known whom he saluted, then the pre-emptor should be asked whether he saluted, the son or the father and if he says 'the father', his right is not annulled; but if says 'the son' then his right is annulled. And if the pre-emptor and the vendee disagree, and the vendee says, "You saluted my son, and therefore you have lost your right"; while the pre-emptor says, "I saluted you," then the words of the pre-emptor will be accepted. This is according to the *Zakhīra*. And if the pre-emptor is informed of the sale of a mansion, and he said, "God be praised, I claim pre-emption," or he said, "Glory to God, I claim pre-emption," then according to the reports of Imām Muḥammad, the pre-emptor retains his right of pre-emption. This is according to the *Badāyi'*. Hence if the pre-emptor having heard of the sale, says, "God be praised I claim pre-emp-

tion," then his right will not be annulled according to the approved view. This is according to the *Wajīz of Kardarī*. And Nāṭifī says that if the pre-emptor's words, 'Glory to God' or '*Kaifa Ashbata*' "(How do you do?", "How are you?") are followed by such words as ("May God prolong your life"), and then he claims pre-emption, then his right will not become void. This is according to the *Zahīriyya*. And similarly if he says "Preemption is mine, and I desire it and obtain it," then also the right continues. This is according to the *Zakhīra*. And if the pre-emptor mentions before the vendee his own needs, or brings to his notice any of his wants, and then demands pre-emption, his right will be annulled. And if he enquires from the vendee about the price of the subject of pre-emption, and on being informed of it demands pre-emption, then his right is extinguished. This is according to the *Muzmarāt*.

في البدائع - سمع البيع فقال الحمد لله قد طلبت شفعتها لاتبطل في المختار كذا في الوجيز للكردري - و قال الناطفي على قياس قوله سبحان الله او كيف اصبحت او كيف امسيت اذا قال للمشتري حين لقيه اطال الله بقائك ثم طلب الشفعة لا تبطل شفعته كذا في الظهيرية وكذلك لو قال (شفعة مراست خوا ستم وبا فتم) فهو على هذا كذا في الذخيرة - لو ساله عن حوائجه او عرض عليه حاجة ثم طلبها بطلت شفعته وان ساله عن ثمنها فاخبره به ثم طلبها بطلت شفعته كذا في المضمرات -

٩٣ - دار بيعت
فقال البائع او
المشتري للشفيع
ابرأنا عن كل
خصومة لك قبلنا
ففعل وهو لا يعلم
انه يجب له قبلهما
شفعة لا شفعة له
في القضاء وله الشفعة
فيما بينه و بين
الله تعالى ان كان
بحال لو علم بذلك
لا يبرأها كذا في
المحيط ولو اخبر
بالبيع و هو في
الصلوة فمضى فيها
فان كان في الفرض
لا تبطل شفعته وكذا
اذا كان في الواجب
وان كان في السنة
فكذلك لان هذه
السنن الراتبة في
معني الواجب سواء
كانت السنة ركعتين
او اربعا كالاربع
قبل الظهر حتى
لو اخبر بعد ما
صلى ركعتين
فوصل بهما الشفع

93. If some property is sold, and then either the vendor or the vendee says to the pre-emptor, "Release us from a certain right of litigation that you have against us," and if the pre-emptor does so even while he is ignorant about the sale and about his right of pre-emption, then his right will be legally annulled, but it survives (morally) before God, provided the pre-emptor would not have released his right had the true facts were brought to his notice. This is according to the *Muḥīṭ*. And if the pre-emptor is informed of the sale while he is praying, and he finishes his prayers, then his right of pre-emption will not be extinguished, provided he was offering *farz* (compulsory) prayers, and the same holds good in the case of *wājib* (obligatory) prayers, and if he were saying *sunnat* prayers at that time, then his right will still survive, because *sunnat rātiba* is deemed to occupy the same position as *wājib* prayers, it is immaterial whether *sunnat* prayers were of two *rak'ats* or of four, e.g. the four *rak'ats sunnat* of *Zuhr* prayer. If when he is informed of sale, he had finished two *rak'ats*

الثاني لم تبطل
شفعة لا نهما بمنزلة
صلوة واحدة واجبة
كذا في البدائع -
في فتاوى ابي
الليثؒ وفي
واقعات النا طفي
اذا علم بالبيع
وهو في التطوع
فجعلها اربعا
اوستا فعن محمدؒ
لا تبطل شفعته قال
الصدر الشهيد
والمختار انه تبطل
لانه غير معذور كذا
في الذخيرة والمحيط
والمضمرات والكبرى -
وفي فتاوى اهو اخبر
وقت الخطبة فلم
يطلب حتى فرغ الامام

and then he finished. the remaining two, his right will not be annulled, because here each of the two *rak'ats* is counted as a single prayer. This is according to the *Badāyi'*. In the *Fatāwā-i-Abu-Lais* and the *Waqyāt Nātfqī'* it is mentioned that if a pre-emptor is informed of the sale at the time of his offering *Tatawa'* prayers, thereafter he finishes two, four, or six *rak'ats* as the case might be, then according to Imām Muhammad his right of pre-emption is not annulled, but Shaikh Sadr Shahīd holds and is also the accepted view, that the right of pre-emption is annulled, on the ground that the pre-emptor's act is not excusable. This is according to the *Zakhīra*, in the *Muhīt*, and the *Muzmarāt-al-Kubrā*.[1] And in the *Fatāwā Ahū* it is mentioned that if the pre-emptor was hearing the *khutba* sermon, from the pulpit

[1] The Muslim service consists of two parts, the *farz*, compulsory prayer, and the *sunnat*, the prayers according to the traditions of the Prophet. The *Farz* prayers are as follows: the *farz* morning prayers 2 *rak'ats*, the *zuhr* early afternoon prayers 4 *rak'ats*, the *'Asr* late afternoon prayers 4 *rak'ats*, the *maghrib* evening prayer at sunset 3 *rak'ats* and the *'Isha* night prayer 4 *rak'ats*; the *sunnat* prayers are said along with the *farz*; the *narfil* or *tatawa'* prayers are not obligatory.

من الصلواة أن
كان قريبا بحيث
يسمع الخطبة لا
تبطل والا ففيه
اختلف المشائخ
ولو اخبره بعد ما
كان قعدة الا خيرة
فلم يطلب حتى
قرأ الدعوات التي
قوله ربنا آتنا في
الدنيا والدين
حسنة ثم سلم
بطلت كذا في
التاتار خانية - في
الفصل الحادي عشر
فيما تبطل شفعة -
و في النوازل اذا
اراد ان يفتتح
الصلواة مع الامام
بجماعة فلم يذهب
في طلبها تبطل
شفعته كذا في
التاتار خانية في
فصل الثالث عشر في
طلب الشفعة -

when he was informed of the sale, and he did not demand pre-emption until the Imām finished the *khutba*, then his right of pre-emption will not be annulled, provided he was sitting so near to the Imām that he could actually hear *khutba*, otherwise on this point different views are held by the jurists. If the pre-emptor is informed of the sale at the last sitting of the prayer, and he did not demand pre-emption till he finished the *Du'ā* by uttering '*Rabbana*, etc.,' thereafter uttered *salām*, then his right would become extinguished. This is according to the *Tātār khāniyya* (Chapter XI) describing the circumstances in which the right of pre-emption is rendered void. And it is stated in the *Nawāzil* that if the pre-emptor is informed of the sale when he is about to join the *jamā'at* congregation, and he does not demand pre-emption, then his right is annulled. This is according to the *Tātār khāniyya* (ChapterrXIII) entitled the Demand of Pre-emption.

---

[1] *Du'a*, is not the essential part of the prayer, *Du'a* is seeking the help of God for oneself, while '*salaut*' is the ritual prayer meant for God alone.

الباب العاشر

CHAPTER X

في الاختلاف الواقع بين الشفيع والمشتري والبائع الشهادة في الشفعة

Of Difference as regards the Evidence between the Pre-Emptor, the Vendee, and the Vendor.

٩٣ - الاختلاف الواقع بين الشفيع المشتري اما ان يرجع الي الثمن واما ان يرجع الي المبيع اما الذي يرجع الي الثمن فلا يخلو اما ان يقع الاختلاف في جنس الثمن واما ان يقع في قدره واما ان يقع في صفته فان وقع في الجنس بان قال المشتري اشتريت بمائة دينار وقال الشفيع بالف درهم فالقول قول المشتري لان المشتري اعرف بجنس الثمن من الشفيع فيرجع في معرفة

94. If the vendee and the pre-emptor differ as to matters of fact, the difference will be with reference either to the price or the property to be pre-empted. If it is as regards the price, it must be in respect of its kind, quantity or quality. When the difference is as to the kind of the price, *e.g.*, the vendee says "I purchased it for 100 *dinars*," and the pre-emptor says, "No, it was for 1000 *dirhams*," then the word of the vendee should be preferred for he must obviously be better acquainted with the price than the pre-emptor. This is according to the *Badāyi'*. When the difference is as to the price itself, the word of the vendee is again preferred, and they need not take the oath. And if they both adduce proof, then according to Imām Abu Ḥanifa and Imām Muḥammad

الجنس عليه كذا في
البدائع واذا اختلف
الشفيع والمشتري
في الثمن فالقول
قول المشتري والا
يتحالفان ولو اقاما
الشفيع عند ابي حنيفة ؒ
البينة فالبينة بينة
و محمد ؒ وقال ابو
يوسف ؒ البينة بينة
المشتري واذا ادعي
المشتري ثمنا وادعي
البائع اقل منه
ولم يقبض الثمن
اخذها الشفيع بما
قال البائع وكان
ذلك حطا عن
المشتري ولو ادعي
البائع اكثر يتحالفان
ويترادّان و ايهما
نكل ظهر ان الثمن
ما يقوله الاخر
فياخذها الشفيع
بذلك وان حلفا
يفسخ القاضي البيع
بينهما و ياخذها
الشفيع بقول البائع
وان كان قبض
الثمن اخذها بما
قال المشتري ان

preference is given to the evidence of the pre-emptor, though according to Imām Abu Yusuf the proof of the purchaser should be preferred. If the vendee offers a certain price, but the vendor takes less than that, he being still unpaid, then the pre-emptor may take the property at the price received by the vendor, and the abatement in the price is deemed as a reduction made, as if by the vendor in the original price. However, if the vendor demands more than the original sale-consideration from the vendee, then they should both take the oath, and if either of them refuses to swear, the price is to be taken as stated by the other, while if they both take the oath, the sale is to be cancelled as between them, and the pre-emptor if he desires may take the property, at the price stated by the vendor, without any regard to that mentioned by the vendee. And if it is not known whether the price has been paid or not, but the vendor says, "I sold it for a 1,000 *dirhams* and have received payment," then the pre-emptor may take the property for 1000 *dirhams*, while if the vendor should say, "I have received the price, and it is 1,000

شاء ولم يلتفت
الى قول البائع
ولو كان نقد الثمن
غير ظاهر فقال
البائع بعت الدار
بالف وقبضت الثمن
فاخذها الشفيع
بالف ولو قال
قبضت الثمن وهو
الف لم يلتفت الى
قوله كذا في
الهداية ـ ولو اشترى
دارا بعرض ولم
يتقابضا حتى
هلك العرض وانتقض
البيع فيما بين
البائع والمشتري
او كان المشتري
قبض الدار ولم
يسلم العرض حتى
هلك او انتقض
البيع فيما بين
البائع والمشتري
وبقي للشفيع حق
الشفعة بقيمة العرض
ثم اختلف البائع
والمشتري في قيمة
العرض فالقول قول
البائع مع يمينه
فان اقام احدهما
بينته قبلت بينة
وان اقاما جميعا
البينة فالبينة بينة
البائع عند ابي
يوسف رح و محمد

then no attention should be paid to this (ambiguous) statement. This is according to the *Hidāya*. If the difference is as regards the quality of the price, *e.g.*, a person purchases a mansion in lieu of chattels and possession is not yet interchanged, Meanwhile the chattels perish, and it results in the cancellation of the transaction between the vendor and the vendee, nevertheless the pre-emptor is entitled to pre-empt the mansion at the value of the chattels; now if the vendor and vendee differ as to their value, the word of the vendor on oath should be preferred. But if either party produces evidence, then the proof should be accepted; while if they both tender proof, then preference should be given to that of the vendor; this is the view of Imām Abu Hanifa and Imām Muḥammad and the same view is held by Imām Abu Yusuf. But if the vendee has destroyed the building, then a proportionate price should be deducted from the original sale-consideration in favour of the pre-emptor. And if they both differ as to the price of the building, and are agreed as to the price of the site being 1,000 *dirhams*, or they both differed

وهو قول ابي حنيفة ؒ ولو هدم المشتري بناء الدار حتي سقط عن الشفيع قدر قيمته عن الثمن ثم اختلفا في قيمة البناء واتفقا علي ان قيمة الساحة الف او اختلفا في قيمة البناء والساحة جميعا فان اختلفا في قيمة البناء لا غير فالقول قول المشتري مع يمينه وان اختلفا في قيمة البناء والساحة فان الساحة تقوم والقول في قيمة البناء قول المشتري فان قامت لاحدهما بينة قبلت وان اقاما جميعا البينة قال ابو يوسف ؒ البينة بينة الشفيع علي قياس قول ابي حنيفة ؒ وقال محمد ؒ البينة بينة المشترى علي قياس قول ابي حنيفة ؒ وان اختلفا في صفة الثمن بان قال المشترى اشتريت بثمن معجل وقال الشفيع لا بل اشترية بثمن موجل

as to the price of both the building and the site, then if they differed only as to the value of the building the words of the vendee on oath should be preferred, and if they differed as to the value of the building and the site then the value of the site should be ascertained, and the word of the vendee on oath as to the value of the building will be preferred, and if either party tenders evidence, then it should be accepted, and if both adduced proof, then Imām Abu Yusuf says, that according to *Qias* based on the view of Abu Ḥanifa, the proof of the pre-emptor will be preferred, while Imām Muḥammad holds that according to *Qias* based on the view of Imām Abu Hanifa the proof of the vendee will be accepted. And if they differed as to the quality of the price, *e.g.*, the vendee says "I have purchased for ready money," and the pre-emptor says, "No you have purchased it on credit," then, the word of the vendee should be accepted. If the difference relates to the thing sold, that is, whether the sale took place by one transaction or two transactions, *e.g.*, a mansion has been purchased, and the purchaser says, "I bought the site separately for

فالقول قول المشتري واما الذي يرجع الي المبيع فهو ان يختلف فيما وقع عليه البيع انه وقع عليه بصفقة واحدة ام بصفقتين نحو ما اذا اشتري دارا فقال المشتري اشتريت العرصة علي حدة بالف وقال الشفيع بل اشتريتهما جميعا بالفين فالقول قول الشفيع وايهما اقاما البينة قبلت وان اقاما جميعا البينة ولم يوقتا وقتا فالبنية بينة المشتري عند ابي حنيفة رح و ابي يوسف رح وعند محمد رح رجل البينة بينة الشفيع هكذا في البدائع -

1,000" and the pre-emptor says, "No, you bought them both for 2,000" then the word of the pre-emptor on oath is to be preferred; and if either of them tender evidence, then that should be accepted, and if they both adduce proof together, without specifying any time, the proof of the vendee should be preferred, according to Imām Abu Ḥanifa and Imām Yusuf, but that of the pre-emptor according to Imām Muḥammad. This is according to *Badāyi'*.

٩٥ - وفي المنتقي بن سماعة عن محمد رح رجل اشتري من رجل دارا و لها شفيعان

95. It is stated in the *Muntaqā* of Ibn Samā'a, and the report is taken from Imām Muḥammad that if a person purchases a house and it has two pre-emptors and one of them comes to the purchaser

فاتي اليه احدهما بطلت شفعته وقال له المشتري اني اشتريتها بالف فصدقه الشفيع في ذلك واخذها بالف ثم ان الشفيع الثاني جاء فاقام بينته ان المشتري كان اشتراه بخمسمائة فالشفيع الثاني ياخذ من الشفيع الاول نصفها و يدفع اليه مائتي درهم وخمسين و يرجع الشفيع الاول علي المشتري بمائتي درهم و خمسين وبقي في يد الشفيع الاول نصف الدار بخمسمائة وفيه ايضا رجل اشترى من رجل دارا و قبضها فجاء الشفيع فطلب الشفعة فقال المشتري اشتريتها بالفين وقال الشفيع لابل اشتريت بالف ولم يكن للشفيع بينة وحلف المشتري علي ما ذكر و اخذه

to demand pre-emption, and the purchaser says, "I have purchased this house for 1,000 *dirhams*," thereupon the pre-emptor after ascertaining the truth of his statement purchases it for 1,000 *dirhams*, thereafter the other pre-emptor appears and adduces proof that the purchaser had purchased it for 500 *dirhams*, then he (the second pre-emptor) is entitled to pre-empt the house for 250 *dirhams* from the first pre-emptor, and the first pre-emptor should recover back from the purchaser 250 *dirhams*, and the first pre-emptor will retain half the portion of the house in lieu of 500 *dirhams*. And it is also mentioned in the *Muntaqā* that if a person purchases a house from another person and takes possession of it, and thereafter the pre-emptor claims pre-emption, then the purchaser says, "I have purchased it for 2,000 *dirhams*" and the pre-emptor said "Nay, you have purchased it for 1000" and the pre-emptor has no proof and the purchaser makes the statement on oath, thereupon the pre-emptor pre-empts the house for 2,000 *dirhams*. Later on, another pre-emptor appears and he adduces proof against the first pre-emptor

الشفيع بالفي درهم ثم قدم شفيع آخر فاقام بينة علي الشفيع الاول ان البائع كان باع هذه الدار من فلان بالف فانه ياخذ نصف الدار بخمسمائة ويرجع الشفيع الاول علي المشتري بخمسمائة حصة النصف الذي اخذه الشفيع الثاني ويقال للشفيع الاول ان شئت اعد البينة علي المشتري من قبل النصف الذي في يديك والا فلا شئي لك ومعني المسئلة ان الشفيع الاول لو قال للمشتري ان الثاني اثبت بالبينة ان الشراء كان بالف فيكون بمقابلة النصف الذي في يدي خمسمائة علي ان ارجع عليك بخمسمائة ليس له ذلك الا اذا عاد البينة ان الشراء كان بالف لما اشار اليه في الكتاب ان الشفيع الثاني انما يستحق البينته

that the seller sold the house to the purchaser for 1,000 *dirhams*, then the second pre-emptor will take half the house for 500 *dirhams*, and the first pre-emptor will recover 500 *dirhams* from the purchaser, but he will be asked to tender evidence on this issue again otherwise he will get nothing. The problem simply means that if the first pre-emptor says to the purchaser, "The second pre-emptor has adduced proof that the house was purchased for 1,000 *dirhams* and hence, I claim 500 *dirhams* from you for half of my possession," then he will not be entitled to it; but if he adduces substantial proof the second time that the sale actually had taken place for 1,000 *dirhams*, then he will be entitled to claim 500 *dirhams* from him. This is so according to the reference in the Book *Muntaqā* that the second pre-emptor is entitled to half of the house only by reason of his proof, and this means that the proof of the second pre-emptor was admissible in each case, *i.e.*, now the sale has been established for 1,000 *dirhams* in respect of that half to which the second pre-emptor is entitled but not in respect of the other half which is

نصف الدار معناه ان بينة الشفيع الثاني لما عمل في نصف الدار يثبت الشراء بالف في حق ذلك النصف الذي استحقه الشفيع الثاني لا في حق النصف الذي في يد الشفيع الاول فيحتاج الشفيع الاول الى اعادة البينة ليثبت الشراء بالالف في النصف الذي في يديه فيستحق الرجوع علي المشتري بالخمسمائة الزائدة كذا في المحيط - وفي الفتاوي العتابية ولو اشترى دارا فجاء الشفيع فاخذها بالف درهم من المشتري بقوله ثم وجد بينته ان المشتري اشترا ها بخمسمائة قبلت بينة ولو صدق المشتري اولافبينته علي خلاف ذلك لا تقبل كذا في التاتار خانية -

in the possesstion of the first pre-emptor, and hence the first pre-emptor must adduce proof in order to establish the sale for 1,000 *dirhams* with reference to his half of the house also, and then he will be entitled to recover 500 *dirhams* from the purchaser. This is according to the *Muḥīṭ*. It is mentioned in *Fatawa-i-Itabiyya* that if a person purchases a house, thereafter the pre-emptor pre-empts the house for 1,000 *dirhams* from the purchaser accepting his word, later on he found proof that the purchaser had bought it for 500 *dirhams* then his proof will be accepted, but if the pre-emptor had already ascertained about this matter before he pre-empted it then further proof cannot be accepted. This is according to the *Tātār Khāniyya*.

٩٦ -اتفق البائع والمشتري ان البيع

96. If the seller and the purchaser are agreed that the sale took place with

كان بشرط الخيار للبائع وانكر الشفيع فالقول قولهما في قول ابي حنيفة و محمد رح واحدي الروايتين عن ابي يوسف رح ولا شفعة للشفيع لان البيع ثبت باقرارهما و انما ثبت علي الوجه الذي اقرا به وفي الجامع اذا ادعي البائع الخيار و انكر المشتري والشفيع ذلك فالقول قول المشتري استحسانا لان الخيار لايثبت الا بالشرط والبائع يدعي احداث الشرط والمشتري ينكر و كذا لو ادعي المشتري الخيار فانكر البائع والشفيع ذلك فالقول قول البائع وياخذ الشفيع كذا في المحيط - رجلان تبايعا فطلب الشفيع الشفعة بحضرتهما فقال البائع كان البيع بيننا بيع معاملة وصدقه

an option for the seller, while the pre-emptor denies it, then according the to view of Imām Abu Ḥanifa and Imām Muḥammad and one of the reports of Imām Abu Yusuf their words will be accepted and the pre-emptor will not be entitled to pre-emption, because the sale can only be established on the agreement of the vendor and the vendee, and it is this that they admit. According to the *Jāmī'* if the seller claimed the option but the purchaser and the pre-emptor denied it, then according to the doctrine of *Istiḥsān* the word of the purchaser will be preferred, because the option is not established unless it is stipulated, and similarly if the purchaser claims the option while the seller and the pre-emptor deny, then the word of the seller will be preferred, and the pre-emptor will be entitled to pre-empt. This is according to the *Muḥīṭ*. Two persons sell and purchase from one another, and the pre-emptor claimed pre-emption in the presence of both of them, thereupon the seller says, "It was only a contract for sale between us, and not the actual sale," and the purchaser confirms it,

المشتري علي ذلك لا يصدقان على الشفيع بل القول لمن ادعى جوازه الا اذا كان الحال يدل عليه بان كان المبيع كثيرالقيمة وقد بيع بثمن قليل لا يباع به مثله فحينئذ يكون القول لهما ولا شفعة للشفيع كذا في خزانة المفتين في المنتقى باع دارا من رجل ثم ان المشتري والبائع تصادقا ان البيع كان فاسدا وقال الشفيع كان جائزا فالقول قول الشفيع ولا اصدقهما على فساد البيع في حق الشفيع بشئي ولو ادعاه احد هما و انكر لآخر اجعل القول فيه قول الذى يدعي الصحة فاذا زعما ان البيع كان فاسدا بشئي

then the word of both of them will not be accepted as against the pre-emptor, but the word of the pre-emptor who affirms the validity of the sale will be preferred, but it will not be accepted if the facts are actually proved to be the same as the purchaser and the seller had represented, *e.g.*, if some valuable property had been sold for a small amount and things of such value are not so cheaply sold, then the statement of the seller and buyer will be accepted, and the pre-emptor will not be entitled to pre-emption. This is according to the *Khizanatul Muftīn*. According to the *Muntaqā* if a person sells a house to another person, and the purchaser and the seller admit that the sale was an invalid, *fasid* sale, but the pre-emptor asserts that it was a valid sale, then the word of the pre-emptor will be preferred, and the statements of the seller and the purchaser about the invalidity of sale will not be accepted; but if one of them asserts the invalidity of the sale, while the other denies it, then we should accept his statement who claims the sale to be valid. And if they are agreed that the sale was invalid, and give the same reason establishing invalidity of the sale,

اجعل القول فيه قول من يدعي الفسادفاني اصدقهما ولا اجعل للشفيع شفعة نريد بهذا ان البائع مع المشتري اذا اتفقا علي فساد البيع بسبب لو احتلف البائع والمشتري فيما بينهما في فساد العقد بذلك السبب لا يصدق فالقول قول من يدعى الجواز ذكرو ان يدعي احد هما اجلافاسدا اوخيارا فاسداً فاذا اتفقا علي الفساد بذلك السبب لايصدق فان في حق الشفيع و اذا اتفقا على فساد البيع بسبب لو اختلفا فيما بينهما في فساد البيع بذلك السبب كان القول

we will then accept the word of both of them, and the pre-emptor cannot pre-empt; by this it is meant that if the seller and the purchaser agree as to the invalidity of sale for some reason for which if the seller and the purchaser differed, among themselves as to the invalidity of sale for that cause, then it is not verified and we will accept the statement of the one who claims validity of sale, as for instance one of them claims that the sale was subject to an option, and they thus both agree as to the invalidity of sale on account of this reason, then their words cannot be accepted as against the pre-emptor. But if they both have agreed as to the invalidity of sale and give such reasons, that if they had differed the word of the person who claims the validity of sale would be accepted, then their words will also be accepted as against the pre-emptor.[1] This case is so illustrated in the *Muntaqā*, *e.g.*, if the purchaser says to the seller, "You sold this house to me for 1,000 *dirhams* and one *ratl*[2] of wine" and the seller says, "Thou art right," then the Court shall not

[1] Some of the illustrations explain these passages more fully.

[2] A *ratl* is equivalent to 480 *dirhams* or a pound weight or a pint measure (Lanes' Arabic English Lexicon).

قول من يدعي الفساد فاذا اتفقا علي الفساد بذلك السبب يصدق قان في حق الشفيع و بين ذلك في المنتقي فقال لو قال المشتري للبائع بعتنيها بالف درهم و رطل من خمر فقال البائع صدقت لم اصدقهما علي الشفيع ولو قال بعتنيها بالخمر و صدقه البائع فلا شفعة للشفيع هذا هو لفظ المنتقي وجعل القدوري في كتابه المذكور في المنتقي قول ابي يوسف رح في احدي الروايتين منه قال القدوري كان ابا يوسف رح علي هذه الرواية يعتبر هذا الاختلاف بالاختلاف بين المتعاقدين ولو اختلف المتعاقدان فيها بينهما فقال المشتري بعتنيها بالف درهم ورطل من خمر وقال البائع لا بل بعتها بالف درهم فالقول قول

accept the words of both of them as against the pre-emptor, but if the purchaser says, "You have sold this house to me for wine," and the seller confirms it, then the pre-emptor is not entitled to pre-emption, it is so stated in the *Muntaqā*, but Imām Quduri observes that what is mentioned in the *Muntaqī* is one of the two reports of Imām Abu Yusuf, and Imām Qudūri has further said that according to this narration Imām Abu Yusuf has resorted to *Qiās, e.g.,* when both the parties differ and the purchaser says, "You have sold this house to me for 1,000 *dirhams* and a *ratl* of wine" while the seller says, "No, I have sold it for 1,000 *dirhams*," then the word of the seller will be accepted. And if the vendee says "You have sold this house to me for wine or a pig," and the vendor says, "I have sold it to you for 1,000 *dirhams*," then the word of the purchaser will be accepted because the sale of wine is not lawful in any way. And the word of the person who claims the validity of sale is accepted only in a lawful contract, contrary to the case of sale subject to option or one such as for 1,000 *dirhams* and one *ratl* of wine. As regards the view of Imām Abu Ḥanifa and Imām Muḥammad

البائع ولو قال المشتري بعتنيها بخمر او خنزير وقال البائع بعتها بالف درهم فالقول قول المشتري لان البيع بخمر لا جواز له بحال و انما يجعل القول قول من يدعي الجواز في عقد له جواز بحال بخلاف البيع باجل فاسد او بالف ورطل من خمر فاما علي قول ابي حنيفة و محمد اذا اتفقا علي الفساد وكذبهما الشفيع فلا شفعة للشفيع علي كل حال كما لو اتفقا علي البيع بشرط الخيار للبائع وكذبهما فيه الشفيع كذا في الذخيرة -

they hold that if the seller and the purchaser agree on the invalidity of sale, while the pre-emptor denies it, then the pre-emptor is not entitled to pre-emption. As for instance, if they agree as to the sale with an option for the seller and the pre-emptor denies it, then he is not entitled to pre-emption. This is according to the *Zakhīra.*

٩٧ - اشترى عشر الضيعة بثمن كثير ثم بقيتها بثمن قليل فله الشفعة في العشر دون الباقي فلو اراد ان يحلفه بالله ما اردت

97. If a person purchases one-tenth part of a farm at a high value, thereafter purchases its remaining portion at a low price, then the pre-emptor is entitled to pre-empt the tenth portion and not the rest of it. However, if the pre-emptor demands an oath from the vendee

بذلك ابطال شفعتي لم يكن له ذالك لانه لو اقر به لا يلزمه واستحلفه بالله ما كان البيع الاول تلجئة فله ذلك لانه معنى لو اقر به يلزمه وهو خصم وهو تاويل ما ذكر في الكتاب انه اذا اراد الاستحلاف انه لم يرد به ابطال الشفعة له ذلك اي اذا ادعى ان البيع الاول كان تلجئة كذا في القنية – في الاجناس اذا قال المشتري اشتريت هذه الدار لابني الصغير وانكر شفعة الشفيع فلا يمين علي المشتري ان كان الشفيع اقران له ابنا صغيراً وان انكر ان له ابنا يحلف الشفيع بالله ما تعلم ان له ابنا صغيراً وان كان الابن كبيرا لو

thus, "By God, I did not mean to defeat your right of pre-emption by such consecutive sales," then there is no use because if he admits, nevertheless he cannot be bound by it in any way. But if the pre-emptor demands an oath in this way, "By God, the first sale was not *taljīyah* with a view to defeat the pre-emptive claim," then he can do so, and the vendee will be bound by it. And the explanation in the *Muntaqa* about such an oath, *viz.*, "by God, I did not mean to defeat your right of pre-emption by these sales, is that the real object was to prove that the first sale was *taljīyah* and not a *bona fide*. This is according to the *Qunya*. It is stated in the *Ajnas* that if the purchaser says, "I have purchased this house for my minor son," and denies the pre-emptor's right of pre-emption, then if the pre-emptor admits that the vendee has a minor son, the vendee will not be bound to swear; but if the pre-emptor denies the existence of the infant son, then the pre-emptor must be sworn thus, "By God, I do not know that he has any infant son." And if the son was a major, and the purchaser has handed possession of the house to him, then he (the purchaser)

قد سلم الدار اليه دفع عن نفسه الخصومة و قبل تسليم الدار هوخصم للشفيع كذا في الذخيرة -واذا اشترى من امراة فاراد ان يشهد عليها فلم يجد من يعرفها الا من له الشفعة فان شهادتهم لا تجوز عليها ان انكرت ذلك كذا في المحيط -:

will be relieved of all litigation, but so long as he has not delivered the house to his major son, he will be a party to the suit instituted by the pre-emptor. This is according to the *Zakhīra*. If a person purchases something from a woman and desires to invoke witnesses on it, but he does not find any person who knows her except the pre-emptor, then the evidence of the pre-emptor will not be lawful as against her in case she denies the sale. This is according to the *Muḥīṭ*.

٩٨ - واذا شهد ابنا البائع علي الشفيع بتسليم الشفعة والدار في يد البائع ان كان البائع يدعي تسليم الشفعة لا تقبل شهادتهما وان كان يجحد تقبل شهادتهما وان كانت الدار في يد المشتري تقبل شهادتهما لانهما بهذه الشهادة لا يجران الي ابيهما

98. If the two sons of a seller give evidence against the pre-emptor that he has surrendered his right of pre-emption, while the property is still in the possession of the seller, who also claims that the pre-emptor had relinquished his right, then the evidence of the sons will not be accepted; but if the seller denies relinquishment of the right by the pre-emptor, then their evidence will be admissible. And if the property were in the possession of the purchaser, then the evidence of the two sons will be admissible because, in this case, the two sons by their evidence, neither do any good to their father

مغنما ولا يدفعان
عنه مغرما واذا
شهد البائعان علي
الشفيع بتسليم
الشفعة لا تقبل
شهادتهما وان كانت
الدار في يد
المشتري لانهما كانا
خصمين في هذه
الدار قبل التسليم
الي المشتري ومن
كان خصما في
شي لا تقبل شهادة
فيه وان لم يبق
خصما اما ابناه
ما كانا خصمين
فى هذه الدار
هذا اذا شهد
ابنا البائع علي
الشفيع بتسليم
الشفعة فاما اذا
شهدا علي المشتري
بتسليم الدار الي
الشفيع فانه لا تقبل
شهادتهما سواء كانت
الدار في يد الاب
او في يد المشتري
وسواء يدعي الاب
او لم يدع كذا
في المحيط–وان كانت
الدار لثلثة نفر
فشهد اثنان منهم
انهم جميعا باعوها
من فلان و ادعي
ذلك فلان جحد

nor protect him from any harm. And if the two sons had deposed to the effect that the pre-emptor had simply acquiesced in the sale, then their evidence cannot be accepted even if the house sold were in the possession of the purchaser, because they were interested parties though the purchaser had taken possession of the property, yet their testimony cannot be accepted. In the above case the evidence of the two sons of the seller was accepted on the ground that they were not interested parties, and this was so only when the two sons of the seller stood as witnesses to the surrender of the right of pre-emption. And if they give evidence to the effect that the purchaser has handed over the house to the pre-emptor, then their evidence will not be heard, it is immaterial whether the house is in possession of their father or the purchaser, and no matter what attitude he adopts. This is according to the *Muḥīṭ*. If a house is owned by three persons and one or two of the co-sharers give evidence that they all have sold it, to a certain person, who also claims it, but one of the co-sharers denies it, then their evidence will not be admissible as against this co-sharer. And the

الشريك لم تجز شهادتهم علي الشريك و للشفيع ان ياخذ ثلثي الدار بالشفعة وان انكر المشتري الشراء فاقربه الشركاء جميعا فشهادتهم ايضا باطلة وللشفيع ان ياخذ الدار كلها بالشفعة كذا في المبسوط -

pre-emptor will be entitled to pre-empt the two-thirds of the property. And if the purchaser does not admit the sale, but the three co-sharers depose that they have sold it to him, then even in this case, their evidence is not admissible, nevertheless the pre-emptor is entitled to take the whole house in pre-emption. This is according to the *Mabsūt*.

٩٩ - واذا وكل الرجل رجلا بشراء دار وبيعها فاشتري او باع وشهد ابنا الموكل علي الشفيع بتسليم الشفعة فان كان التوكيل بالشراء لا تقبل شهادتهما سواء كانت الدار في يد البائع او في يد الوكيل او في يد الموكل وان كان التوكيل بالبيع فان كانت الدار في يد الموكل او في يد الوكيل لا تقبل شهادتهما لانهما يشهد ان

99. If a person appoints an agent to buy or sell a house and the agent purchases or sells it, and the two sons of the principal depose as to the surrender of the right of pre-emption by the pre-emptor, now in this case if the principal appointed the agent to buy the house, then the evidence of the two sons will not be admissible, no matter whether the house is in the possession of the seller, or the agent, or his principal ; but if the principal appointed the agent to sell the house, then aslo their evidence will not be admissible, should the house sold be in the possession of the principal or the agent, because by their evidence their father's ownership in the house is with advantage established, however if the

علي ابيهما بتقرر
الملك لا بيهما وان
كانت الدار في
يد المشتري تقبل
شهادتهما كذا في
المحيط – واذا شهد
البائعان علي
المشتري ان الشفيع
قد طلب الشفعة
حين علم بالشراء
والشفيع مقر انه منذ
ايام وقال المشتري
وما طلب الشفعة
فشهادة البائعين
باطلة وكذلك
شهادة اولادهما
كما لو شهدا علي
المشتري بتسليم
الدار الي الشفيع
وان قال الشفيع
لم اعلم بالشراء
الا الساعة فالقول
قوله مع يمينه فان
شهد البائعان انه
علم منذ ايام
فشهادتهما باطلة
ان كانت الدار
في ايديهما او في
يد المشتري كذا في
المبسوط – قامت بينة
ان الشفيع سلم
الشفعة وقامت بينة
ان البائع والمشتري
سلم الدار قضي

house sold were in the possession of the purchaser, then their evidence will be admissible. This is according to the *Muḥīṭ*. If the two vendors give evidence against the purchaser that the pre-emptor claimed pre-emption when he heard of the sale, and the pre-emptor admits that he came to know about the sale recently, while the purchaser says that he did not claim pre-emption, then the evidence of both the vendors is useless and likewise the evidence of their sons would be useless as was the case when they gave evidence that the purchaser had delivered the house to the pre-emptor. And if the pre-emptor says, "I heard of the sale just now," then his word on oath will be accepted. And if both the sellers were to depose that some time ago the pre-emptor had heard about the sale, then their evidence will not be admissible provided the house is either in the possession of the two sellers or the purchaser. This is according to the *Mabsūṭ*. If evidence is produced to the effect that the pre-emptor has surrendered his right of pre-emption, and evidence is also produced to the effect that the seller and the purchaser have handed

بهما للذي في يده كذا في محيط السرخسي - واذا كفل رجلان بالدرك المشتري ثم شهدا عليه بتسليم الدار الي الشفيع بالشفعة فشهادتهما باطلة وكذلك ان شهدا ان الشفيع سلم الشفعة فهما بمنزلة البائعين في ذلك لا تقبل شهادتهما كذا في المبسوط -

over the house subject of pre-emption, to the pre-emptor, then the decree will be passed in favour of the person who has the possession of the house. This is according to the *Muhīt* of *Sarakhsi*. If two persons guarantee the purchaser for any defect that may be found in the property, and thereafter they *āt.* se that he has surrendered the h the pre-emptor, then their ... ce will not be accepted, and similarly if they both depose that the pre-emptor has surrendered his right of pre-emption, then their evidence will not be accepted because they stand as if in the place of the seller. This is according to the *Mabsūt*.

١٠٠ - اذا اقر المشتري انه اشتري هذه الدار بالف درهم واخذها الشفيع بذلك ثم ادعي البائع ان الثمن الفان واقام علي ذلك قبلت بينة وكان للمشتري ان يرجع علي الشفيع بالف آخر وان اقر ان الثمن

100. If the purchaser says, "I have purchased this house for 1,000 *dirhams*," and the pre-emptor pre-empts the house for the same price, while the seller claims that the price was 2,000 *dirhams*, and invoked witnesses on it, then his witnesses will be heard, and the purchaser will have the option to recover the balance of 1,000 *dirhams* from the pre-emptor, even though the latter had paid the price of 1,000 ***dirhams***. Similarly if the seller claims thus

"I have sold this house to the purchaser for some specified goods," thereafter invoked witnesses on it, then the Kazi after hearing the witnesses will pass a decree in lieu of the same specified goods against the purchaser, and the prê-emptor will pre-empt the house in lieu of the value of the specified goods. Consequently if the amount which the pre-emptor paid to the purchaser, namely, 1,000 *dirhams*, is less than the full value of the goods, then he will pay the additional amount to the purchaser, but if the amount is more than the full value of the goods, then the pre-emptor is entitled to demand back the excess. If a person marries a woman in lieu of a house on condition that she should give him 1,000 *dirhams*, then according to Imām Abu Ḥanifa the right of pre-emption arises against a portion of the house of the value of 1,000 dirhams, but Imām Muḥammad and Abu Yusuf hold the contrary view. And if they differ on the question of dower, and the husband says that her *mahr-i-misl* is 1,000 *dirhams*, then the pre-emptor may pre-empt half of the house; but if the pre-emptor

الف وكذلك اذا
ادعي البايع انه
باعها من هذا
المشتري بعرض
بعينه و اقام علي
ذلك بينة فالقاضي
يسمع بينة ويقضي
له بذلك علي
المشتري وسلم
الدار للشفيع بقيمة
ذلك العرض فان
كان ماا خذ المشتري
وذلك الف اقل من
قيمة العرض رجع
علي الشفيع بما ز
او علي الالف الي
تمام قيمة العرض
وان كان اكثر من
قيمة الارض رجع
الشفيع عليه بما
زاد علي قيمة العرض
الي اتمام الالف
واذا تزوج امراة
علي ان ترد علي
الزوج القاضي
وجبت الشفعة في
حصته الا عند
ابي يوسف ومحمد
فاختلفا في مهر
مثلها وقت العقد
فقال الزوج كان
مهر مثلها الفا و
للشفيع نصف الدار
وقال الشفيع كان

احدثت فيها هذا
البناء وكذبه الشفيع
مهر مثلها خمسمائة
ولي ثلثا الدار
فالقول قول الزوج
مع يمينه وان
اقاما البينة فالبينة
للمشتري عند هما
كما لو اختلفا في
مقدار قيمة البناء
الهالك فاذا ادعى
على رجل حقا في
ارض او دار فصالحه
على دار فللشفيع
فيها الشفعة بقيمة
ذلك الحق الذي
ادعى فان اختلفا
في قيمة ذلك الحق
فالقول قول المدعي
وهو المأخوذ منه
وان اقاما البينة
على قيمة ذكر
هنا ان البينة بينة
الشفيع عند ابي
حنيفة رح هكذا في
المحيط-واذا اشترى
الرجل دار بالف
درهم ثم اختلف
الشفيع والمشتري
فقال المشتري

says that her *mahr-i-misl* is 500 *dirhams* and he should get two-thirds of the house in pre-emption, then the word of the husband on oath will be accepted. And if both the parties produce witnesses, then, according to the two disciples, the witnesses of the purchaser will be accepted, similar to the case as regards the value of a ruined building. If a certain person files a suit against another person in respect of some property, thereafter he compounds the claim in lieu of a house, then the pre-emptor is entitled to pre-empt the house obtained in compromise. And if they differed as to the value of the claim, then the word of the pre-emptor will be preferred, and if they both adduce proof as to its value, then in this case, according to Imām Abu Ḥanifa the evidence of the pre-emptor will be accepted. This is according to the *Muḥīṭ*. If a person purchases a house for 1000 *dirhams*, thereafter the pre-emptor and the purchaser differ, the purchaser says, " I have constructed this building in this house, and the pre-emptor denies it, then the word of the purchaser will be accepted. And if both adduce proof, then the proof of the

فالقول قول المشتري وان اقاما البينة فالبنية بيّنة الشفيع وعلى هذا اختلافهما في شجر الارض ولكن انما يقبل قول المشتري اذا كان محتملا حتى اذا قال احدثت فيها هذه الا شجار من لم يصدق على ذلك وكذلك فيما اشبهه من البناء وغيره وان قال اشتريتها منذ عشر سنين واحدثت فيها هذا فالقول قوله كذا في المبسوط –

pre-emptor will be preferred. Similarly if they differ as to the trees standing on a certain plot, then the same law is applied but it should be noted that the word of the purchaser will be accepted only when it savours with truth; *e.g.*, if the purchaser had said that he planted trees only yesterday then his word will not be accepted.[1] And the same principle will apply in similar cases to buildings, etc., whereas if he said that he purchased the land ten years ago, and had then planted trees in it, then his word would be accepted. This is according to the *Mabsūṭ*.

١٠١ – ولو قال المشتري باعني الارض ثم وهب لي البناء اوقال . هب لي البناء ثم باعني الارض وقال الشفيع بل اشتريتهما معا فالقول للمشتري وياخذ المبيع بلا بناء ان شاء كذا في محيط السرخسي –

101. If the purchaser says that the owner of the house sold him first the land, he then made a gift of the building to him, or he says that he made a gift of the building, thereafter sold the land, but the pre-emptor says "No, you have purchased both at the same time," then the word of the purchaser will be accepted. And the pre-emptor, if he so desires may pre-empt the land without pre-empting the building. This is according to the *Muḥīṭ* of *Sarakhsī*. But

[1] Because it is impossible to have full grown up trees in course of a single day.

و ان قال
البائع لم اهب لك
البناء فالقول قوله
مع يمينه ويأخذ
بناءه وان قال قد
وهبته لك كانت
الهبة جائزة كذا
في المبسوط-ولوقال
المشتري وهب لي
هذا البيت مع
طريقه من هذا
الدار ثم اشتريت
بقيتها وقال الشفيع
لابل اشتريت الكل
فللشفيع الشفعة
فيما اقر انه اشترى
ولا شفعة فيما ادعى
من الهبته وايهما
اقام البينة قبلت
بينته وان اقاما
جميعا البينة فالبينة
بينة المشتري عند
ابي يوسف رح لانها
تثبت زيادة الهبة
وينبغي ان تكون
البينة الشفيع عند
محمد رح لانها
تثبت زيادة
الاستحقاق كذا

if the seller says, "I have not made a gift of the building to you," then his word on oath will be accepted, and the pre-emptor is entitled to pre-empt the building; but if the seller says "I have made a gift of the building to you," this will be lawful (and in this case no pre-emption arises"). This is according to the *Mabsūt*. If the purchaser says, "The owner of the house made a gift of this house along with its way to me, and then I purchased its remaining portion," while the pre-emptor says, "No, you have purchased the whole house," then the pre-emptor is entitled only to pre-empt that portion of the house which the purchaser admits to have purchased, and he cannot pre-empt that portion which is subject of the gift and if either of them tender evidence then his proof will be accepted; but if both tender evidence, then according to Imam Abu Yusuf the evidence of the purchaser will be accepted, because the witnesses establish the gift, but according to Imām Muḥammad the proof of the pre-emptor should be preferred, for it establishes the right of pre-emption. This is according to the

Badāyi'. If the *Shafī'-i-jār* admits that a certain house of the enclosure was first made a gift to the purchaser and the purchaser affirms that he took the gift before he purchased the rest of the property, then there exists no right of pre-emption for the *Shafī'-i-jār*, because the purchaser had become a sharer in the property at the time of the purchase of the remaining portion; but if the *jār* says, "No, the purchase took place before the gift and hence, I have the right to pre-empt the sale," then the statement of the pre-emptor will be accepted, but if evidence is produced to the effect that the gift was made before the sale, then the claim of the donee will be preferred to that of the *Shafī'-i-jār* as regards the rest of the property. This is according to the *Muhīt*. And if the donor denies the gift of the house, then his word on oath will be accepted, and if he confirms the word of the purchaser,[1] then the house will belong to the donee, but as regards the rest of the property his statement will be of no use in invalidating the right of pre-emption; however if witnesses were produced to the effect that the gift had preceded the sale, then the donee will

في البدائع – وان اقر
بهبة البيت للمشتري
وادعي المشتري ان
الهبة كانت قبل
الشراء فلا شفعة للجار
لانه شريك في
الحقوق وقت شراء
الباقي والجار
يقول لابل كان
الشراء قبل الهبة
ولي الشفعة فيما
اشتريت فالقول قول
الشفيع واذا قامت
البينة علي الهبة
قبل الشراء فان
صاحبها اولي بالشفعة
من الجار كذا في
المحيط – فان جحد
البائع هبة البيت
كان القول قوله مع
يمينه ان صدقي
البائع المشتري فيما
قال كان البيت للمو
هوب له ولا يصدق
قان علي البطال
الشفعة في الدار الا
ان تقوم البينة علي
الهبة قبل شراء
الدار فيصير

[1] *i.e.*, the donee.

المشتري شريكا في الدار فيتقدم علي الجار كذا في فتاوى قاضي خان–

become a *sharīk*, co-sharer, and hence he will have a preferential right to the rest of the property as against the *Shafī'-i-jār*. This is according to the *Fātāwā-i-Kāzi-Khān.*

١٠٢ – ولواشترى دارين و لهما شفيع ملاصق فقال المشتري اشتريت واحدة بعد واحدة فانا شريكك في الثانية وقال الشفيع لابل اشتريتهما صفقة واحدة فلي الشفعة فيهما جميعا فالقول قول الشفيع لان المشتري اقر بشرائهما و ذلك سبب لثبوت الحق ثم يدعي حقا لنفسه بدعوى تفريق الصفقة فالقول للشفيع ولو قال المشتري اشتريت ربعا ثم ثلثة ارباع فلك اربع وقال الشفيع بل اشتريت ثلثة اربع ثم ثم ربعا فالقول للشفيع لان المشتري اقر بشرى ثلثة ارباع وهو سبب

102. If a person purchases two such houses that have a *Shāfi'-i-Mulāṣik*, and the purchaser says, "I have purchased them one after another, and hence, I am along with you entitled to pre-empt the second house" while the pre-emptor says, "No, you have purchased both the houses by one transaction of sale, and hence, I have a right of pre-emption in both of them," then the word of the pre-emptor will be accepted, because the purchaser has at least admitted to have purchased both the houses, though he asserts separate transactions, and it is a sufficient cause to give rise to the right of pre-emption. If the purchaser says, "I have purchased one-fourth of the house, and thereafter its three-fourths, therefore your right of pre-emption appertains to one-fourth of the house," and the pre-emptor says "No, you have rather first purchased three-fourths, and then the one-fourth," then the word of the pre-emptor will be accepted, because the purchaser has admitted to have purchased the three-fourths, and this is a sufficient

لثبوت حق الشفعة
ثم ادعي اما يسقطه
وهو تقدم الربع في
البيع فلا يصدق
ولو قال المشتري
اشتريت صفقة واحدة
وقال الشفيع اشتريت
نصفا فان آخذ
النصف فالقول
للمشتري و ياخذ
الشفيع الكل او
يدع كذا في
محيط السرخسي -
رجل اقام البينة
انه اشترى هذه
الدار من فلان
بالف درهم واقام
آخر البينة انه
اشترى منه هذا
البيت بطريقه
بمائة درهم منذ
شهر قضيت بالبيت
بينهما لصاحب
الشهر ثم له الشفعة
فيما بقى من الدار
ولو لم بوقت شهود
صاحب البيت قضيت
بالبيت بينهما
نصفين وقضيت
ببقية الدار للذي

cause to establish the right of pre-emption, though now he refers to it in such a manner that it will invalidate the cause that is, he says that he had purchased one-fourth first, and if the purchaser says, "I have purchased the whole house by one transaction," but the pre-emptor says, "No you have first purchased the half, and hence, I desire to pre-empt the half," then the word of the purchaser will be accepted, and the pre-emptor will have the option either to take whole house or surrender his right. This is according to *Muḥīṭ-of-Sarakhsī*. A person adduces proof that he purchased an enclosure from a certain person for 1000 *dirhams*, and another person adduces proof that he purchased a certain house in the enclosure with the right of way from another person for 100 *dirhams* about a month ago, then the Court shall pass a decree in favour of that person who will tender proof as to the time of sale, and he will be entitled to pre-empt the rest of the enclosure. And if there was no evidence as to the time of purchase, then the Court shall pass a decree in the favour of both the persons, half of the property for

اقام البينة علي انه اشتري كلها ولا شفعة لو احد منهما علي صاحبه لانه يثبت سبق شراء احدهما ولو كانت الدار ان متلازقتين فاقام رجل بنية انه اشتري احدهما منذ شهر بالف درهم وآقام آخر بنية انه اشتري الاخري منذ شهرين قضيت له بشراء هذه الدار منذ شهرين كلها وقتت شهود جعلت له الشفعة في الدار الاخري ولو لم يوقتا قضيت لكل واحد منهما بداره ولم اقض بالشفعة له وكذلك لو كان احدهما قبض الدار ولم يقبض الاخر ولو وقت احدهما ولم يوقت الاخري قضيت لصاحب الوقت بالشفعة كذا في المبسوط -

each, and none of the two are entitled to exercise his right of pre-emption over the other, as none has established that he had purchased first. And if two houses were adjacent to each other, and a person tenders evidence, saying "I purchased one of these two houses a month ago for 1000 *dirhams*" and some other person adduces proof, saying "I purchased the other house two months ago," then the Court shall pass a decree in favour of the latter who adduced proof that he had purchased the house two months ago, and thereby has established his right of pre-emption in the other house. And if both the parties fail to prove the time of sale, then no decree shall be made for neither is entitled to the right of pre-emption as against the other, and the same will be the case where one of the two purchasers has already taken possession of the house purchased by him, while the other has no such possession. And if one of the two persons tenders evidence as to the point of time, while the other fails to do so, then a decree of pre-emption shall be given in favour of that person who has tendered evidence. This is according to the *Mabsūṭ*. A person purchased a house,

and the pre-emptor claims that the purchaser has demolished a part of the house, while the purchaser denies it, then the word of the purchaser will be preferred, but if the pre-emptor tenders evidence, then it will be preferred. This is according to the *Fatāwā-i-Kāzī Khān*.

رجل اشترى دارا
فادعي الشفيع ان
المشتري هدم طائفة
من الدار كذبه
المشتري كان القول
قول المشتري والبينة
بينة الشفيع كذا
في فتاوى قاضي
خان -

الباب الحادي عشر

في الوكيل بالشفعة وتسليم الوكيل بالشفعة وما يتصل به

CHAPTER XI

As regards appointment of an agent for pre-emption, and the surrender of the right of pre-emption by him, and that which appertains to it.

١٠٣ - واذا اقر المشتري بشراء الدار وهي في يده وجبت فيها الشفعة وخصمه الوكيل ولا تقبل من المشتري بينته انه اشتراها من صاحبها اذا كان صاحبها غائبا حتى لو حضر صاحبها بعد اقامة المشتري البينة علي الشراء منه وصدقه فيما اقر له من الملك وكذبه فيما ادعي من الشراء يسترد الدار من يد الشفيع ويسلم الي البائع لانهم اتفقوا علي ان اصل الملك كان له ولم يثبت النقل من المشتري ولكن

103. If an agent admits the purchase of a house which is in his possession, then the right of pre-emption arises, and the agent will be made a party to the suit, but his statement to the effect that he purchased the house from its owner when the latter is absent, will not be accepted. Consequently if the owner turns up after the agent had adduced proof of the purchase from him, and he accepts the allegation about his ownership but denies the fact of sale, then in this case the house cannot be pre-empted by the pre-emptor, and it will be restored to the owner, because they all agree that the ownership of the house is vested in him, and the agent has not established the sale. The owner will be sworn thus: "By God I have not sold this house," and if he swears accordingly then the house must be restored to him. However if proof is adduced in presence of the owner to the

يحلف صاحبها بالله ما بعتها من هذا المشتري فاذا حلف حنيئذ ترد الدار عليه فان قامت بينته بمحضر صاحبها انه باعها من المشتري يثبت الشراء و تسلم الدار للشفيع و تقبل هذه البينة من المشتري و من الشفيع و ان اقر البائع بالبيع و انكر المشتري و الدار في يد البائع قضي بالشفعة كذا فى المحيط — واذا اقر المشتري بالشراء وقال ليس لفلان فيها شفعة سالت الوكيل البينة علي الحق الذي وجبت له بالشفعة من شركة او جوار فاذا اقامها قضيت له بالشفعة و ذلك بان يقيم البينة علي ان الدار التي الي جنب المبيعة ملك لموكله فلان فاذا اقام البينة ان الدار التي الي جنب الدا،

effect that he had sold the house to the purchaser, then the sale will be established, and the house will be pre-empted by the pre-emptor, the purchaser and the pre-emptor are both entitled to tender such evidence. And if the seller admits the sale, and the purchaser denies it, and the house is in the possession of the seller then also a decree for pre-emption could be passed. This is according to the *Muḥīṭ*. If the purchaser admits his purchase, but asserts that such and such a person is not entitled to pre-emption, then the Court shall demand evidence from the agent (of the pre-emptor) as to the cause of the pre-emption, whether it is by reason of partnership or neighbourhood that the right of pre-emption accrues, and if he tenders proof then the Court shall pass a decree of pre-emption in his favour, *e.g.*, he should prove that the house which is situated next to the house sold belongs to his principal. If he adduces proof that the house which is next to the house sold is merely in the possession of his principal, then the Court shall not accept such proof, and the Court shall not also accept the evidence of the two sons of the principal or his parents or his

المبيعة في يد موكله لم
اقبل ذلك منه قال ولا
اقبل من ذلك شهادة
ابني الموكل و ابويه
و زوجته ولا شهادة
المولى اذا كان
الوكيل او الموكل
عبدا له او مكاتبا
كذا في المبسوط -
و اذا اراد
اثبات الشفعة
بالشركة فاقام بينة
ان لموكله فلان
نصيبا من هذه
الدار المبيعة ولم
يبينوا مقداره
لا يقبل ذلك منه
ولا يقضى له بالشفعة
كذا في الذخيرة -
و اذا وكل
رجل رجلا باخذ
دار له بالشفعة ولم
يعلم الثمن صح
التوكيل و اذا
اخذها الوكيل
بما اشتراها المشتري
لزم الموكل و ان كان
ذلك ثمنا كثيرا بحيث
لا يتغابن الناس
فيها سواء اخذها
بقضاء او بغير قضاء
كذا في المحيط -
١٠٤ - واذا وكل
رجل الشفيع ان
ياخذ الدار له

wife, and the Court shall not accept the evidence if the agent or the principal were an absolute slave or slave *mukātib*. This is according to the *Mabsūṭ*. If he (the agent of the pre-emptor) intends to establish pre-emption by reason of partnership and adduces proof that his principal has a share in the house sold, but the witnesses do not depose as to the extent of his share, then such proof cannot be accepted, and a decree for pre-emption cannot be passed in his favour. This is according to the *Zakhira*. If a person appoints another person as his agent to pre-empt a certain house on his behalf, but did not inform him of the sale price nevertheless such an appointment is lawful; consequently if the agent pre-empts it for the price for which the purchaser had purchased, then the principal will be bound by it, no matter whether this price is so much that people in general will not be willing to purchase it at such a price, and whether he pre-empted it under the decree of the Kāzī or by mutual agreement. This is according to the *Muḥīṭ*.

104. A person appoints the pre-emptor as his agent to pre-empt the house on his behalf, and if the pre-emptor

بالشفعة فاظهر
الشفيع ذلك فليس
له ان ياخذها لان
طلبه لغيره تسليم
منه للشفعة فانما
يطلب البيع من
الموكل ولو طلب
البيع لنفسه كان
به مسلما لشفعة
فاذا طلبها لغيره
اولى ولما كان اظهاره
ذلك بمنزلة التسليم
للشفعة استوى فيه
ان يكون المشتري
حاضرا او غير حاضر
فان اسّر ذلك حتى
اخذها ثم علم
بذلك فان كان
المشترى سلمها اليه
بغير حكم فهو جائز
وهى للآمر لانه
ظهر انه كان مسلما
شفعته ولكن تسليم
المشتري اليه سمحا
بغير قضاء بمنزلة
البيع المبتداء
فكان اشتراها للآمر
بعد ماسلم الشفعة
و ان كان القاضي

acts accordingly then he himself will not be entitled to pre-empt the house in question, because the demand of pre-emption by the pre-emptor on behalf of another person amounts to the surrender of his own right of pre-emption, for what he demands is in effect a purchase on behalf of his principal, while if he demanded the purchase for himself it would not be considered a surrender of his right of pre-emption, and since he demands on behalf of another person, his act will obviously be regarded as a surrender of his own right of pre-emption; and since his conduct as an agent, amounts to a surrender of his right of pre-emption it will make no difference whether the purchaser is present or not. And if the pre-emptor does not disclose the fact of his being an agent till he takes the house, and he thereafter discloses it, then if the purchaser has handed over the house in question to him it will be considered valid, and the house in question will become the property of the principal, because it is evident that the pre-emptor had relinquished his right of pre-emption, and the act of the original purchaser in delivering the property in good faith without the decree of the

بها فانها ترد علي المشتري الاول لانه لما ظهر انه كان مسلما شفعة تبين ان القاضي قضي علی المشتري الاول بغير سبب فيكون قضاءه باطلا فترد الدار عليه كذا في المبسوط -

Kāzī will be considered as if a fresh sale, that is the pre-emptor after having relinquished his right of pre-emption has purchased the house on behalf of the principal, but if the Kāzī has passed a decree of pre-emption, then the house will be restored to the real purchaser, because when it is proved that the pre-emptor had surrendered his right, then it is obvious that the decree of the Kāzī is of no consequence and the house should be restored to the purchaser. This is according to the *Mabsūṭ*.

١٠٥ - ولا يصح توكيل الشفيع المشتري باخذ الشفعة سواء كانت الدار في يده او في يد البائع كذا في المحيط - ولو وكل البائع بالاخذ بالشفعة جاز ذلك في القياس و في الاستحسان لايجوز ذلك و اذا قال قد وكلتك بطلب الشفعة بكذا درهما و اخذه فان كان الشراء وقع بذلك او باقل فهو وكيل و ان كان باكثر

105. And if the pre-emptor appoints the purchaser as an agent to pre-empt the house on his behalf, such appointment will be considered invalid, whether the house were in the possession of the purchaser or in that of the seller. This is according to the *Muḥīṭ*. And if he (pre-emptor) appoints the seller as an agent to pre-empt the house on his behalf, then according to the doctrine of *qiās*, such an act is considered valid; but according to *Istehsān* it is invalid. And if the pre-emptor says to the seller, "I appoint you an agent to pre-empt the house for so many *dirhams*," now if the purchase has

really taken place for that amount or less, then his appointment as an agent is valid; but if the price is a greater amount, then it is invalid. Similarly if the pre-emptor says, 'I appoint you as an agent to pre-empt that house provided that the house has been purchased by that particular person,'' now if it happens that the purchaser was some other person, then this agent's appointment is of no use. If the pre-emptor appoints two persons as agents to pre-empt the house on his behalf, then one of them may file the suit, but he alone cannot get possession of the house without the presence of the other. And if one of them surrenders the right of pre-emption in presence of the Kāzī, then such surrender will be binding upon the principal. This is according to the *Mabsūṭ*. If the pre-emptor appoints an agent to pre-empt the house on his behalf, then the agent is not entitled to appoint another person as an agent, but if the principal has conferred a general power of attorney on the agent to do whatever he likes, then he may lawfully appoint another person as sub-agent. However if the principal had delegated all his powers, and the agent appoints another sub-agent, and also autho-

فليس بوكيل
وكذلك لو قال
وكلتك بطلبها ان
كان فلان اشتراها
فاذا قد اشتراها
غيره لايكون وكيلا
واذا وكل رجلين
بالشفعة فلاحدهما
ان يخاصم الآخر
ولا ياخذ احد
هما بدون الآخر
و اذا سلم احد
هما الشفعة عند
القاضي جاز على
الموكل كذا في
المبسوط - و اذا
وكل وكيلا ياخذ
الشفعةفليس للوكيل
ان يوكل غيره
الا ان يكون الامر
اجاز ما صنع فان
اجاز ما صنع و وكل
الوكيل وكيلا و
اجاز ما صنع لم
يكن لهذ الوكيل
الثاني ان يوكل
غيره الوكيل
بالشفعة اذا سلم
الشفعة ذكر في
شفعة الاصل انه ان

سلم في مجلس
القاضي صح و ان
سلم في غير مجلس
القاضي لا يصح
عند ابي حنيفةؒ
و محمدؒ وهو قول
ابي يوسفؒ الاول
ثم رجع ابو
يوسفؒ عن هذا
وقال يصح تسليمه
في مجلس القاضى
وفي غير مجلس
القاضي فعلى
رواية كتاب
الشفعة جوز تسليمه
في مجلس القاضى
ولم يحك فيه خلافا
وذكر في كتاب
الوكالة والماذون
الكبيران تسليمه
في مجلس القاضى
صحيح عند ابي
حنيفةؒ وابي يوسفؒ
خلافا لمحمدؒ
و تبين بما ذكر في
كتاب الوكالة والما
ذون ان ما ذكر فى
الشفعة قول ابي
حنيفة و ابي يوسفؒ
كذا في المحيط -

rises him to do as he pleases then this sub-agent has no authority to appoint a third person as an agent. And if the agent surrenders the right of pre-emption, then it is stated in the *Asl* that if he surrendered it in the Court of the Kāzī, it will be valid, but if otherwise, then according to Imām Abu Ḥanifa and Imām Muḥammad, and according to the former view of Imām Abu Yusuf it is not valid; but subsequently Imām Abu Yusuf changed his view and said that the surrender is valid in both the cases. Hence, according to the reports of *Kitābus Shufa*,' the surrender in the Court of the Kāzī is lawful; and there is no difference of opinion on this point. And it is stated in the *Kitābul Vikālat* and *Mazoon Kabir* that according to Imām Abu Ḥanifa and Imām Abu Yusuf, the surrender of the right of pre-emption by the agent in the Court of the Kāzī is valid, while Imām Muḥammad holds the contrary view: hence, from the passages of *Kitābul Vikālat* and *Mazoon Kabīr* it appears that what is mentioned in *Kitābus Shufa*' is the view of Imām Abu Ḥanifa and Imām Abu Yusuf only. This is according to the *Muḥīṭ*.

If there are two persons who are pre-emptors of a house, and they appoint a

و اذا كان للدار
شفيعان فوكل
رجلا و احدا
ياخذهما فسلم
الشفعةلاحدهماعند
القاضي و اخذ
كلها للآخر فهو
جائز و ان قال
عند القاضي قد
سلمت شفعة احد
هما ولم يبين ايهما
هو وقال انما طلبت
شفعة الآخر لم يكن
له ذلك حتي يبين
لا يهما سلم نصيبه
ولا يهما ياخذ كذا
في المبسوط-الوكيل
بالشفعته اذا طلب
الشفعة و ادعي
المشتري التسليم
ان ادعي التسليم
علي الموكل و يطلب
يمين الوكيل بالله
ما تعلم ان الموكل
قد سلم الشفعة
او يطلب يمين
الموكل بالله ما
سلمني الشفعة فان
طلب يمين الوكيل
فالقاضي لايحلفه
وان طلب يمين
الموكل فالقاضي
يقول له سلم الدار
الي الوكيل لياخذها
لموكله بالشفعة وان

person as an agent to pre-empt the house on their behalf, and in the Court of the Kāzī he surrenders the rights of pre-emption on behalf of one of his principals only, and pre-empts whole house for the other, then he can do so. And if he states before the Kāzī, "I surrender the right of pre-emption of one of the two principals," without specifying which of the two pre-emptors, and demands pre-emption for the other only, then he cannot do so unless he states which pre-emptor's right he has surrendered, and whose right he demands. This is according to the *Mabsūṭ*. If the agent demands pre-emption, and the purchaser claims the surrender of the right of pre-emption by the principal, and demands an oath from the agent thus, "By God I do not know that the principal has surrendered his right of pre-emption," or if he demands an oath from the principal, *viz.*, "By God I have not relinquished my right of pre-emption," now if the purchaser demands such an oath from the agent, the Kāzī cannot put the agent on oath, and if he demands it from the principal, then the Kāzī will say to him, "Deliver this house to the agent and let him pre-empt it on behalf of his

طلب يمين الموكل
وان ادعي التسليم
علي الوكيل ويطلب
يمينه فالقاضي
لا يحلفه عند ابي
حنيفة و محمد رح
خلافا لابي يوسف رح
وكذلك اذا شهد
شاهدان علي
الوكيل انه سلم
الشفعة عند غير
القاضي فشهادتهما
باطلة عند ابي
حنيفة و محمد رح
خلافا لابي يوسف رح
وكذلك اذا شهد
شاهدان عليه انه
قد سلم عند القاضي
ثم عزل قبل ان
يقضي عليه لم
يجز عند ابي حنيفة
ومحمد رح ولو اقر
الوكيل عند القاضي
انه قد سلم الشفعة
عند غير قاض او
عند قاض آخر
فاقراره صحيح
ويكون بمنزلة انشاء
التسليم عند هذا
القاضي كذا في
محيط السرخسي -
واذا شهد ابنا الوكيل
او ابنا الموكل ان
الوكيل قد سلم
الشفعة عند غير

principal," and if the purchaser claims the surrender by the agent and demands this oath, then according to Imām Abu Ḥanifa and Imām Muḥammad, the Kāzī shall not put the agent on oath, but Imām Abu Yusuf holds the contrary view. If two witnesses depose that the agent surrendered the right of pre-emption outside the Court of the Kāzī then also according to Imām Abu Ḥanifa and Imām Muḥammad, their deposition is useless, but Imām Abu Yusuf holds the contrary view. Similarly if two witnesses depose that the agent had surrendered his right in the Court of the Kāzī, but before the decree was passed, the agency was revoked, then according to Imām Abu Ḥanifa and Imām Muḥammad the surrender is illegal. And if the agent admits before the Kāzī that he has surrendered the right of pre-emption outside Court or before any other Kazi," then such admission is valid, and it will be considered as if he now surrenders his right *ab initio*. This is according to the *Muḥīṭ* of *Sarakhsī*. And if two sons of the agent or of the principal depose that he surrendered his right outside the Court of the Kāzī, then such evidence is admissible, but if the two sons of the principal depose to

قاضٍ اجزت شهادتهم ولا تجوز شهادة ابني الموكل علي الوكالة ولا شهادة ابني الوكيل كذا في المبسوط -

establish the appointment of an agent, or if the two sons of the agent depose on the same point, then it is not admissible. This is according to the *Mabsūṭ*.

١٠٦ - ولو وكل رجلا ببيع داره فباعها بالف ثم حطّ عن المشتري مائة درهم وضمن ذلك للامر ليس للشفيع ان ياخذها بالشفعة الا بالالف كذا في محيط السرخسي - الوكيل بشراء الدار اذا اشترى وقبض فجاء الشفيع وطلب الشفعة من الوكيل قبل ان يسلم الوكيل الدار الي الموكل صح وان كان بعد تسليم الموكل لايصح وتبطل شفعة وهو المختار كذا في خزانة المفتين والفتاوي الكبرى - وهكذا في المتون -

106. And if a person appoints an agent for the sale of his house, and he sells it for 1000 *dirhams*, and thereafter reduces 100 dirhams from the price in favour of the purchaser, but he himself makes up the reduction to the principal, then the pre-emptor must pre-empt the house for 1000 *dirhams*. This is according to the *Muḥīṭ* of *Sarakhsī*. If the agent purchases the house and takes its possession, thereafter the pre-emptor demands pre-emption from him before he had actually handed over the house to the principal, then such demand of the pre-emptor is valid, but if he demands pre-emption after the agent had delivered possession of the house to the principal, then the demand will be invalid, and the right of pre-emption will be invalidated. And this is the accepted view. This is according to the *Khizānatul Muftīn* and *Fatāwā-i-Kubrā*, and a similar view is held in the *Mutūn*.

اذا كان البائع وكيل الغائب فللشفيع ان ياخذها منه اذا كانت في يده لانه عاقد وكذا اذا كان البائع وصيا لميت فيما يجوز بيعه كذا في السراج الوهاج - ولو قال المشتري قبل ان يخاصمه الشفيع اشتريت لفلان وسلم اليه ثم حضر الشفيع فلا خصومة بينه وبين المشتري ولو اقر بذلك بعد ما خاصمه الشفيع لم تسقط الخصومة عنه ولو اقام بينة انه قال قبل شرائه انه وكيل فلان لم تقبل بينته وردي عن محمد انه تقبل بنية لدفع الخصومة حتى يحضر المقر له كذا في محيط السرخسي -

If the seller is an agent of another person, then the pre-emptor is entitled to pre-empt the house from him provided the house is in his possession, because he is an *Akid* (contractor), and similarly where the seller is an executor of a deceased person, then the pre-emptor is entitled only to pre-empt those things which he is entitled to transfer. This is according to the *Sirājal Wahāj*. If the purchaser, before the pre-emptor files the suit for pre-emption says, "I have purchased this house for such and such a person," and then hands over the house to that person, thereafter the pre-emptor appears, then there can be no ground for litigation between him and the purchaser. But if the purchaser says the same after the pre-emptor had filed the suit for pre-emption, then he will continue to be a party to the suit. But if the purchaser adduces proof to the effect, that he had said the same before the sale took place, that he was an agent of such and such a person, then according to one view this evidence will not be accepted, but it is reported from Imām Muḥammad that such evidence will be accepted to suspend the litigation till the person in whose favour the admission is made

appears before the Court. This is according to the *Muḥīṭ* of *Sarakhsī.*

١٠٧ - ولو وكله بطلب شفعة في دار ليس له ان يخاصم في غيرها لان الوكالة تتقيد بالتقييد وقد قيد الوكالة بالدار التي عينها ولو وكله بالخصومة في كل شفعة تكون له كان جائزاً وله ان يخاصم في كل شفعة تحدث له كما يخاصم في كل شفعة واجبة له ولا يخاصم بدين ولا حق سوى الشفعة لتقييد الوكالة الا في تثبيت الحق الذي تطلب به الشفعة اذا وكل رجلا بطلب شفعة له فاخذها ثم جاء مدع يدعي في الدار شيئا فالوكيل ليس بخصم له ولو وجد في الدار عيبا كان له ان يردها به لا ينظر في ذلك الي غيبة الذي وكله كذا في المبسوط - ولو

107. If a person appoints an agent to demand pre-emption in a particular house, then he is not entitled to pre-empt another house, because agency for a particular purpose is limited to that purpose only, and the principal by specifying the house, has limited the agency ; however it will be otherwise, if the agent is given a general authority in respect of pre-emption ; but even here he cannot litigate to recover debt or any other right except that of pre-emption; since the agency is confined to pre-emption only, therefore he is entitled to litigate only for that purpose. And if the principal appoints an agent to demand pre-emption the latter pre-empts the house, thereafter a certain claimant brings a suit asserting his right in the house pre-empted, then the agent need not be made a party to the suit. And if the agent discovers some defect in the house, subject of pre-emption, then he is entitled to cancel the sale on account of the defect without waiting for the assent of the principal. This is according to the *Mabsūṭ.* If a person appoints

وكل رجلا بطلب كل حق له وبالخصومة والقبض ليس له ان يطلب شفعته وله ان يقبض شفعته قد قضي بها كذا في محيط السرخسي – و اذا وكله بطلب شفعة له فجاء الوكيل قد غرق بناء الدار واحترق نخيل الارض فاخذ بجميع الثمن فلم يرض الموكل فهو جائز علي الموكل لا يستطيع رده كذا في المبسوط – ولو طلب المشتري من الوكيل بطلب الشفعة ان يكف عنه مدة علي انه علي خصومة و شفعة جاز كذا في محيط السرخسي – وان مات الوكيل قبل الاجل

an agent to exercise all his rights *in præsenti* conduct ligitation and take possession[1] then he is not entitled to demand pre-emption, though he is entitled to take possession of the house for which a decree of pre-emption has been passed. This is according to the *Muḥīṭ* of *Sarakhsī*. If a person appoints another person to demand pre-emption, and the agent turns up when the property, subject of pre-emption, is submerged under water or the trees are burnt up,[2] and the agent pre-empts the property at its original value, but the principal disapproves of this transaction, nevertheless it will be binding upon the principal, and he cannot cancel it. This is according to the *Mabsūṭ*. If the purchaser asks the agent of the pre-emptor not to file the suit for a certain length of time with the condition that the agent will retain the pre-emptive right, then such suspension is lawful. This is according to the *Muḥīṭ* of *Sarakhsī*. If the agent dies before the period

[1] It seems that the Agent has no power as regards pre-emption for the latter is a right *in futuro*, *i.e.*, it only accrues after sale of the property.

[2] Destruction due to supernatural causes (*vis major*) and in this case the pre-emptor must pay the full sale consideration.

ولم يعلم صاحبه بموته فهو على شفعته فاذا مضي الاجل و علم بموته فلم يطلب او لم يبعث وكيلا آخر يطلب له فلا شفعة له كما كان الحكم في الابتداء قبل ان يبعث هذا الوكيل ومقدار المدة في ذلك مقدار المسير من حيث هو على سير الناس كذا في المبسوط -

expires and the principal was not informed of his death, then the principal will still retain his right of pre-emption. But if the period expires, and the principal comes to know about the death of the agent, and still he makes no demand of pre-emption or appoints no agent to demand pre-emption on his behalf, then his right will be extinguished. However if the principal is away in some other town, then he will be allowed a reasonable period of time sufficient to enable him to come over to the place by an ordinary mode of journey. This is according to the *Mabsūṭ*.

الباب

الثاني عشر

في شفعة الصبي

١٠٨ - الصغير كالكبير في استحقاق الشفعة كذا في المبسوط - قال و الحبل في استحقاق الشفعة والكبير سواء فان وضعت لاقل من ستة اشهر منذ وقع الشراء فله الشفعة وان جائت به لستة اشهر فصاعدا منذ وقع الشراء فانه لا شفعة له لانه لم يثبت وجوده وقت البيع لا حقيقة ولا حكما الا ان يكون ابوه

CHAPTER XII

THE RIGHT OF PRE-EMPTION PERTAINING TO MINORS.

108. As regards pre-emption a minor person is on the same footing as an adult. This is according to the *Mabsūṭ*. And even a fœtus in the womb has the right of pre-emption just like a grown-up person, provided it were born at less than six months from the time of purchase, but if born at six months or more from that date, he will have no right of pre-emption. Because in the latter case it cannot be presumed nor can it be established that the child was conceived at the time when the purchase took place.[1] However if the father dies before the sale transaction and the fœtus inherits some property, then he will be entitled to pre-empt the property sold

---

[1] Under the Muhammadan law in order that the child should be legitimate it must be conceived in lawful wedlock and it must be born at least six months from the date of marriage. *Quære* whether a child born within less than six months of the marriage of his parents should be considered legitimate under Section 112 of the Indian Evidence Act 1872, *vide* by the present author "A Dissertation on the Muslim Law of Legitimacy" *vide* also Seleh Muhammad *vs.* Muhammad Hameed, 48 All., 625 (1926).

مات قبل البيع
وورث الحبل منه
حينئذ يستحق
الشفعة وان جائت
بالولد لستة اشهر
فصاعدا لان وجوده
وقت البيع ثابت
حكما لما ورث من
ابيه ثم اذا وجبت
الشفعة للصغير
فالذي يقوم بالطلب
والاخذ من قام
مقامه شرعا في
استيفاء حقوقه وهو
ابوه ثم وصي ابيه ثم
جده ابوابيه ثم
وصي الجد ثم
الذي نصبه القاضي
فان لم يكن احد
من هؤلآء فهو علي
شفعة اذا ادرك فاذا
ادرك فقد ثبت له خيار
البلوغ و الشفعة
فاختار رد النكاح
او طلب الشفعة
فايهما كان اولا يجوز
و يبطل الثاني
و الحيلة في ذلك
ان يقول طلبتهما
الشفعة و الخيار
و اذا كان له احد
من هؤلآء فترك
طلب الشفعة مع

though his birth should take place, at six months or more from the date of the sale; for in this case his conception in the womb is established impliedly. When the right of pre-emption accrues in favour of a minor, the person to demand and take possession, is his own lawful guardian, *viz.*, his father, or his father's executor, or his paternal grandfather, or the grandfather's executor, and finally his guardian duly appointed by the Kāzī. If there is none of these to pre-empt on his behalf then his right remains intact, till he attains sufficient understanding (puberty). And if the option of puberty[1] and the right of pre-emption accrue at the same time, he may either rescind the contract of marriage, or demand pre-emption, and whichever he first mentions that takes effect, and the other becomes void; but this fatal consequence however, may be averted thus by saying, "I demand both of them, *Shufa'* and the option of puberty." And if the lawful guardian of a minor surrenders the right of pre-emption, when able to make, then the right becomes void, with the result that the minor on attaining

[1] The right vested in a minor to repudiate the marriage on attaining puberty.

الامكان بطلت الشفعة حتى لو بلغ الصغير لا يكون له حق الاخذ وهذا قول ابي حنيفة وابي يوسف رح واذا سلم الاب والوصي و من هو بمعناهما شفعة الصغير صح تسليمه عند ابي حنيفة وابي يوسف رح حتى لو بلغ الصبي لايكون له ان ياخذها بالشفعة سواء كان التسليم في مجلس القاضي او في غير مجلس القاضي هكذا في المحيط - ولو كان المشتري اشترى الدار باكثر من قيمتها بما لا يتغابن الناس في مثله والصبي شفيعها فسلم الاب ذلك من اصحابنا من يقول يصح التسليم هنا عند محمد رح ايضا والاصح انه لا يصح التسليم

puberty cannot avail himself of the right of pre-emption. This is so according to Imām Abu Ḥanifa and Imām Abu Yusuf. And further according to them, if the father, or his executor, or any one coming within the meaning of lawful guardian should surrender the minor's right of pre-emption, the surrender will be valid. So that if the minor on attaining puberty will have no power to pre-empt the property sold. It is immaterial whether the surrender was made in the Kāzī's Court or elsewhere. This is according to the *Muḥīt*. And if the purchaser buys a house at such a high price as people in general will not be willing to pay for it, and the pre-emptor of that house happens to be a minor, and his father surrenders his minor son's right, then some of our jurists hold that in such a case the surrender will be valid, and this is so according to Imām Muḥammad. But according to *all* jurists the correct view is that such surrender is invalid, for since the price is excessive, the father is deemed to have no right to pre-empt on behalf of the minor, and mere silence to demand pre-emption or its surrender is valid only where a person is able to pre-empt the property,

عند هم جميعا لانه لا يملك الاخذ لكثرةالثمن و سكوته عن الطلب و تسليمه انما يصح اذا كان مالكا للاخذ فيبقي الصبى على حقه اذا بلغ كذا في المبسوط - واذاسلم الاب شفعة الصغير و الشراء باقل من قيمته بكثير فعن ابي حنيفةؒ انه يجوز وعن محمدؒ لايجوز ولا رواية عن ابي يوسفؒ كذا في الكافي -

therefore the minor when he will attain puberty, will be allowed to pre-empt it. This is according to the *Mabsūṭ*.

And if the father of a minor surrenders his minor son's right of pre-emption while the purchase has taken place for a very small price, then according to the report from Imām Abu Ḥanifa, the surrender is lawful, but according to Imām Muḥammad, it is not lawful, and there is no report from Imām Abu Yusuf on this point. This is according to the *Kāfī*.[1]

١٠٩ - اشترى دارا الا بنه الصغير والاب شفعيها كان للاب ان ياخذها بالشفعة عندنا كمالو اشتري الاب مال ابنه لنفسه

109. A father purchases a house for his minor son, and the father himself is its pre-emptor, then according to us,[2] the father is entitled to pre-empt the house. This is similar to the case of a father purchasing the property of his

---

[1] Under the Anglo-Muhammadan Law it seems that in all these cases the surrender will be deemed to be lawful and the minor will have no right to demand pre-emption on attaining puberty.

[2] The Hanafi jurists.

ثم كيف ياخذ
يقول اشتريته و
اخذت بالشفعة و
لوكان مكان الاب
وصيه ان كان في
اخذ الوصي هذه
هذه الدار منفعة
للصغير بان وقع
الشراء بغبن يسير
بان كان قيمة الدار
مثلا عشرة وقد
اشتري الوصي باحد
عشر فان الغبن
اليسير يتحمل من
الوصي في تصرفه
مع الاجانب وياخذ
الوصي بالشفعة
يرتفع ذلك الغبن
فاذا كانت الحالة
هذه كان اخذ
الوصي بالشفعة
منتفعا به في حق
الصغير وكان للوصي
ان ياخذ بالشفعة
علي قياس قول ابي
حنيفة رح و احدي
الروايتين عن ابي
يوسف رح كما في
شراء الوصي شيئا
من مال الصغير
لنفسه وان لم يكن
في اخذ الوصي
هذه الدار بالشفعة
منفعة في حق
الصغير بان وقع
شراء الدار للصغير

minor son for himself. Now the question arises as to how he should pre-empt the house, and the answer is that the father should say "I purchase it and I pre-empt it." If in the place of a father there was his executor and the fact of his pre-empting the property were in the interest of the minor, *e.g.*, the price of the house was 10 *dirhams*, but the executor purchased it for 11 *dirhams*, then since the actual price of the house was 10 *dirhams* and the executor had purchased it for 11 *dirhams*, then his act in pre-empting the property was obviously in the interest of the minor. Hence according to the view of Imām Abu Ḥanifa based on *Qias* and one of the two reports from Abu Yusuf, the executor is entitled to pre-empt just in the same way as he is legally entitled to purchase the property of a minor for himself. However if the exercise of the right of pre-emption is disadvantageous to the minor, *e.g.*, the purchase of the house for the minor took place for a fair (equal) value, then according to the consensus of opinion, the executor is not entitled to pre-empt it just in the same way as the executor is not allowed to purchase for himself

بمثل القيمة لا يكون
للوصي الشفعة
بالاتفاق كما لايكون
للوصي إن يشتري
شيئا من مال اليتيم
لنفسه بمثل القيمة
بالاتفاق و متى كان
للوصي ولاية الاخذ
يقول اشتريت و
طلبت الشفعة ثم
يرفع الامر الى القاضي
حتى ينصب قيما
عن الصبي، فياخذ
الوصي منه بالشفعة
و يسلم الثمن اليه
ثم القيم يسلم
الثمن الي الوصي
هكذا في المحيط -
اشتري الاب و اراد
ابنه الصغير شفيعها
فلم يطلب الشفعة
للصغير حتى
بلغ الصغير
فليس للذي بلغ
ان يا خذها بالشفعة
لان الاب كان
متمكنا من اخذها
بالشفعة لان الشراء
لا ينافي الاخذ
بالشفعة فسكوته
يكون مبطلا للشفعة
ولو باع الاب دارا
لنفسه و ابنه الصغير
شفيعها فلم يطلب
الاب الشفعة للصغير

the property of a minor at its fair value. This is the view according to all jurists. Hence where the executor is allowed to pre-empt he should say, "I purchased it, and now demand pre-emption," and then refer the matter to the Kāzī, who will appoint a Curator on behalf of the minor and from whom the executor might pre-empt the property and pay the price to him, and thereafter the Curator will entrust the price to the executor. This is according to the *Muhīt*.

If a father purchases a house and his minor son is its pre-emptor, and the father does not pre-empt the house on behalf of his minor son then the son, on attaining majority (puberty) will not be entitled to pre-empt the house, because his father had the power to demand it in pre-emption, since nothing prevented the father from demanding pre-emption, and his silence has invalidated the right of pre-emption. And if the father sells a certain house of his own, of which his minor son is its pre-emptor and the father does not claim pre-emption (on behalf of his minor son), then the minor's right of pre-emption is not invalidated, and he on attaining majority (puberty), will be entitled to pre-empt it, because in

لا تبطل شفعة الصغير حتى بلغ الصغير كان له ان ياخذها لان الاب هنا لايتمكن من الاخذ بالشفعة لكونه بائعا وسكوت من لا يملك الاخذ لا يكون مبطلا واما الوصي اذا اشترى داراً لنفسه او باع الدار له والصبي شفيعها فلم يطلب لوصي شفعته فاليتيم على شفعة اذا بلغ كذا في الذخيرة - وهكذا في محيط السرخسي -

this case the father had no power to pre-empt for he was himself the seller and the silence of such person who is not able to demand pre-emption cannot extinguish the pre-emptive right of another person. And if the executor sells a certain house or purchase it for himself, while his ward (minor) is its pre-emptor, and he does not demand pre-emption on behalf of his ward, then the ward will retain his right of pre-emption until he attains majority (puberty). This is according to the *Zakhīra* and the *Muḥīṭ* of *Sarakhsī*.

١١٠ - ويجب ان يكون الجواب في شراء الاب داراً لنفسه وابنه الصغير شفيعها على التفصيل ان لم يكن للصبي في هذا الاخذ ضرر بان وقع شراء الاب الدار بمثل القيمة او باكثر من القيمة مقدار ما يتغابن الناس في مثله لا تكون للصغير الشفعة اذا بلغ وان كان للصغير في هذا

110. Therefore the law appears to be that where the father purchases a house for himself while his minor son is its pre-emptor, then if there will be no harm to the minor son's in pre-empting the father's purchase, that is when the price of the house is fair or is such that its value is tolerable in the general estimation of the people, then the minor son even after attaining majority (puberty) will be entitled to pre-emption, notwithstanding his father's implied surrender, but if there is a likelihood of some harm to the minor in pre-empting his father's

الاخذ ضرر بان وقع شراء الاب باكثر من القيمة مقدار مالا يتغابن الناس فيه كان له الشفعة اذا بلغ لان الاب لا يملك الصرف في مال الصغير مع نفسه علي وجه الضرر فلم يكن الاب متمكنا في الاخذ في هذه الصورة فلا يكون سكوته مبطلا للشفعة كذا في المحيط -- اذا قال الاب او الوصي اشتريت هذه الدار بالف درهم للصغير فقال له الشفيع اتق الله فانك اشتريتها بخمسمائة فصدقه لا يصدق وياخذ الدار بالف درهم حتي يقيم البينة علي المشتري بخمسمائة كذا في التاتار خانية - الاب اذا اشتري لابنه الصغير دارا ثم اختلف مع الشفيع في الثمن فالقول قول

purchase, that is if the father has paid for the house such an amount that people in general will not be inclined to pay, consequently the father did not demand pre-emption on behelf of his minor son, then the latter on attaining majority (puberty) will have no right of pre-emption, because the father (in the capacity of the lawful guardian is not authorised to deal with the property of the minor son to (his son's) disadvantage. This is according to the *Muḥīṭ*. If a father or an executor says, "I have purchased this house for 1000 *dirhams* for this minor," and the pre-emptor says, "Fear God, you have purchased it for 500 *dirhams*," then if the father or the executor admits this statement, it cannot be binding as against the minor, and the pre-emptor will have to pre-empt it for 1000 *dirhams*; however if the pre-emptor adduces proof that the property was actually purchased for 500 *dirhams* only, then such proof will be accepted. This is according to the *Tātār Khāniyya*. If a father purchases a certain house for his miner son, and the pre-emptor disputes its price, then the word of the father will be accepted, as he denies the claim of the pre-emptor for the price offered for it, and

الاب لانه ينكر التملك للشفيع بما يدعيه ولا يمين عليه لان النكول لا يفيد كذا في المحيط -

the father is not bound to swear and his refusal to take the oath will be of no consequence. This is according to the *Muḥīṭ*.

الباب

الثالث عشر

في حكم الشفعة
واذا وقع الشراء
بالعروض

١١١ - من اشترى
لا يخلو اما
ان يكون بما له مثل
كالمكيلات والموزونات
والعدديات المتقاربة
واما ان يكون بما لا مثل
له كالمذروعات
المتفاوتة كالثوب
والعبد ونحو ذلك
فان كان بما له مثل
فالشفيع ياخذ بمثله .
وان كان بما لا مثل
له ياخذ بقيمته عند
عامة العلماء ولو
تبايعا دارا بدار
فلشفيع كل واحدة
من الدارين ان
ياخذ بقيمتها لان
الدار ليست من
ذوات الامثال فلا
يمكن الاخذ بمثلها
وعلي هذا يخرج
ما لو اشتري دارا
بعرض ولم يتقابضا
حتي هلك العرض
بطل البيع فيما
بين البائع والمشتري

CHAPTER XIII

Of Pre-emption in Case of Exchange of Commodities.

111. If a person exchanges property, it will be obviously for something that belongs to the "Class of Similars," *e.g.*, things estimated by a measure of capacity or weight or number, or for something that belongs to the "Class of Dissimilars," *e.g.*, grain in general, a piece of cloth, a slave, or similar things. According to our jurists in the former case pre-emption is allowed at a similar thing, and in the latter case pre-emption is allowed, at its value. If a mansion were exchanged for another, then the pre-emptor of each shall pay its value because mansions are not of the "Class of Similars." And when a mansion is sold for a chattel, the pre-emptor is allowed to pre-empt it for the value of the chattel. And if the chattel actually perishes before its delivery to the purchaser, then between the seller and purchaser the sale would be cancelled, nevertheless the pre-emptor is entitled to pre-empt the mansion for the value of the chattel. And similarly if the

وللشفيع الشفعه وكذا لو كان المشتري قبض الدار ولم يسلم العرض حتي هلك ثم الشفيع انما ياخذ بما وجب بالعقد لا بما اعطي بدلا من الواجب حتي لو اشتري الدار بالدراهم اوالدنانير ثم دفع مكانه عرضا فالشفيع ياخذ بالدراهم لا بالعرض كذا في البدائع - واذا اشتري دارا بعبد بعينه فللشفيع ان ياخذها بالشفعة بقيمة العبد عندنا فان مات العبد قبل ان يقبضه البائع انتقض الشراء وللشفيع ان ياخذها بقيمة العبد عندنا وكذلك ان ابطل البائع البيع بعيب وجده بالعبد وان لم يكن شئي من ذلك واخذ الشفيع الدار من

vendee takes possession of the mansion, and does not deliver to the vendor the chattel which meanwhile perishes, nevertheless the pre-emptor would still pre-empt the property for the value of the chattel. The pre-emptor is to take the property for the agreed consideration and not in lieu of anything which subsequently has been given instead of it. Thus if a person purchases a mansion for *dirhams* or *dinars*, and afterwards delivers instead of the amount a certain chattel, nevertheless the pre-emptor can pre-empt the mansion for *dirhams* and not for the value of chattel. This is according to the *Badayi'*. If a house is exchanged for a particular slave, the pre-emptor may pre-empt it for the value of the slave ; even though the slave were to die before seller takes its delivery, and whereupon the sale between the seller and purchaser would be cancelled, nevertheless the pre-emptor according to our jurists is entitled to take the house for the value of the slave. Similarly if the seller invalidates the sale on account of some defects discovered in the slave, and returns him to the purchaser, nevertheless the pre-emptor is entitled to take the house for the value of the slave ; however if none

البائع اخذها بقيمته
والعبد لصاحبه
لا سبيل للمبائع
عليه وان اخذها
من المشتري بقيمة
العبد لقضاء او
بغير قضاء ثم مات
العبد قبل القبض
او دخله عيب فان
القيمة للبائع كذا
في المبسوط - قال
محمد في الاصل اذا
اشتري الرجل دارا
بعبد بعينه واخذ
الشفيع الدار بقيمة
العبد بقضاء القاضي
ثم يستحق العبد
بطلت الشفعة واخذ
الدار من الشفيع
وهذا اذا اخذ
الشفيع الدار بقيمة
العبد بقضاء القاضي
وان كان المشتري
قد سلم الدار
الي الشفيع بقيمة
العبد بغير قضاء
ان كان قد سمي
للشفيع قيمة العبد
كذا و كذا حتي
صار الثمن معلوما

of these incidents happen, then the pre-emptor is entitled to pre-empt the house from the buyer, in lieu of the value of the slave, who will remain with his previous owner, and the purchaser will have no right against him (slave). If the pre-emptor takes the house from the purchaser for the value of the slave under the decree of the Kazi, or by mutual arrangements, and then the slave happens to die before possession is taken of him or a defect is found in him, then its price should be paid to the seller. This is according to the *Mabsūṭ*. Imam Muhammad has stated in the *Asl* that when a house is exchanged for a slave and the pre-emptor pre-empts the house for the value of the slave under the decree of the Kazi, and afterwards the slave is claimed by another person, the decree of pre-emption will be annulled and the house will be taken back from the pre-emptor. This effect follows when the pre-emptor takes the house in lieu of the value of the slave in accordance with the decree of the Kazi. But if the purchaser delivers the house to the pre-emptor voluntarily in lieu of the value of the slave, which has been made known to the pre-emptor,

من كل وجه ثم استحق العبد ليس للمشتري علي الدار سبيل ويجعل ذلك بيعا مبتدأ ويكون للبائع علي المشتري قيمة الدار وان لم يكن سمي للشفيع قيمة العبد كذا وكذا ولكن قال سلمت الدار لك بقيمة العبد كان للمشتري ان يسترد الدار من الشفيع كذا في المحيط -

that is, the value is ascertained, and thereafter the slave is claimed by another and is taken possession of, in such circumstances the purchaser will not be entitled to the house for his act (voluntary transfer) will be considered as a sale *de novo*, and the seller is entitled to receive the price of the house from the purchaser. However, if the value of the slave has not been mentioned to the pre-emptor, and the purchaser delivers the house to him in lieu of the value of the slave, then the purchaser has the right to reclaim the house from the pre-emptor. This is according to the *Muḥīṭ*.

١١٢ - وان اشتري دارا بعبد ثم وجد بالعبد عيبا فرده اخذها الشفيع بقيمة العبد صحيحا لان العبد دخل في العقد بصفة السلامة وانما يقوم في حق الشفيع علي الوجه الذي صار مستحقا بالعقد ولو اشتري عبدا بدار فهذا وشراء الدار بالعبد سواء كذا في المبسوط - واذا اشتري دارا بعبد غيره واجاز

112. If a house is exchanged for a slave, and thereafter the slave is returned on account of some defect subsequently found in him, then the pre-emptor will take the house for the value of a sound slave; because the slave was entered into the contract as sound, and with respect to the pre-emptor he stands in the same conditon, whereby a right to him was acquired under the contract. If a slave was exchanged for a mansion, then this case and the purchase of a mansion for a slave are both alike. This is according to the *Mabsūṭ*. If a

صاحب العبد
الشراء فللشفيع
الشفعة واذا وقع
الشراء بمكيل او
موزون بعينه استحق
المكيل والموزون
فقد بطلت الشفعة
لان المكيل والموزون
اذا كان بعينه
فهو والعبد سواء
وان كان المكيل
والموزون في الذمة
فاوفاه ذلك ثم
استحق ذلك فشفعة
الشفيع على حاله
لان المكيل والموزون
اذا كان في
الذمة فهو والدراهم
سواء وفي المنتقي
بن سماعة عن
محمد في رجل
اشترى من آخر
دارا بالكوفة
بكر حنطة بعينه
اوبغير عينه وتقابضا
ثم خاصمه الشفيع
في الدار بمرو
فقضي له عليه
بالشفعة والدار

person exchanges a house for a slave, which is owned by another person who confirms the transaction, then the pre-emptor will be entitled to pre-emption. If the exchange of some property takes place for a definite thing capable of being estimated by a measure of capacity or weight, and then if such a thing is reclaimed on proof of ownership by another person, the right of pre-emption will be extinguished because a definite thing is treated in the same way as a slave. But if the thing in lieu of exchange is due from the purchaser and he delivers it to the seller, afterwards it is reclaimed on proof of ownership by another person, then the right of pre-emption cannot be affected in any way, because a thing, subject of exchange, duly delivered by the purchaser, is treated in the same way as *dirhams*. It is reported in the *Muntaqa* by Ibn Sama'a that according to Imām Muḥammad if a person purchases from another person a house in Kufa for ascertained or unascertained quantity *Kar*[1] of wheat, and both of them respec-

[1] A measure of capacity consisting of six ass-loads (Lane's Arabic-English Lexicon).

بالكوفة او بمرو قال
ان شاء المشتري
اخذ الشفيع حتي
ياخذ منه حنطة
مثلها بالكوفة وسلم
له الدار بمرو وان
شاء سلم له الدار
واخذ منه بمرو
قيمة الحنطة بالكوفة
وسلم وقال في
موضع آخر من
المنتقي ان كان
قيمة الكر في
الموضعين سوا* اعطاه
الكر حيث قضي
له بالشفعة فان
كانت القيمة متفاضلة
نظر في ذلك ان
كان الكر في الموضع
الذي يريد الشفيع
ان يعطي اغلي
فذلك الي الشفيع
يعطيه ذلك حيث
شاء وان كان ارخص
فرضي به المشتري
فذلك اليه وان
تساويا اعطي
المشتري قيمة ذلك
في الموضع الذي
فيه ما يساوي في موضع
الشراء كذا في
المحيط - ولثواشري

tively interchange possessions, thereafter the pre-emptor brings a suit for pre-emption in Marv and the suit is decreed against the purchaser. And it is immaterial whether the house is situated in Kufa or Marv, the purchaser is entitled to demand an equal quantity of wheat in Kufa, and after having done so he should deliver the house pre-empted to the pre-emptor in Marv. And if he desires he may deliver the house to the pre-emptor in Marv and take the price of the wheat at the rate available in Kufa.* And it is reported in the *Muntaqa* that if the current price of one *Kar* of wheat is the same in both the places, then the pre-emptor should deliver the *Kar* of wheat at the place where he obtains the decree. And if there is any difference in the price, and the rate of the wheat in the place where the pre-emptor wishes to give is high, then the pre-emptor is entitled to give the wheat at either place at his pleasure, but if the wheat were cheaper at a certain place and the purchaser also agrees then he may take it there, and if the price were the same then the pre-emptor may give the value of wheat at any place to the purchaser. This is according to the

Muḥīṭ. If a person purchases a house for a *Kar* of dates, and the pre-emptor appears after they were consumed, then he will be entitled to pre-empt the house on paying the value of the dates. This is according to the *Kāfī.*

دارا بكر من
رطب فجاء الشفيع
بعد ما انقطع
الرطب من ايدي
الناس فانه ياخذ
الدار بقيمة الرطب
هكذا في الكافي -

الباب الرابع عشر

في الشفعة في فسخ البيع والاقالة ومايتصل بذلك

١١٣ - مشتري الدار اذا وجد بالدار عيبا بعد ما قبضها و ردها بالعيب وكان ذلك بعد ما سلم الشفيع الشفعة فللشفيع ان باخذها بالشفعة ان كان الرد بالعيب بغير قضاء قاض ولو كان الرد بقضاء قاض فليس للشفيع ان ياخذها وان كان الرد بالعيب قبل قبض الدار وان كان بقضاء فلا شفعة للشفيع وان كان بغير قضاء فذلك عند محمد رح واما علي قول ابي حنيفة و ابي يوسف رح قد اختلف المشائخ بعضهم قالو للشفيع الشفعة و بعضهم

CHAPTER XIV

OF THE VOIDABILITY AND REVOCATION OF SALE AND OTHER THINGS PERTAINING TO IT.

113. If the purchaser after taking possession discovers some defect in the property, and returns it because of the defect, and this fact is known after the pre-emptor relinquishes his right of pre-emption, then the pre-emptor will be entitled to pre-empt the property provided it has not been returned under the decree of the Kazi; for if returned under the decree of the Kazi, the pre-emptor cannot pre-empt it. If the purchaser before taking possession returns the property on account of some defect, then the pre-emptor will not be entitled to pre-empt, if the return was effected by the decree of the Kazi, but if it was effected voluntarily, even then Imām Muhammad holds the same view, however our jurists differ on this point on the authority of Imām Abu Hanifa and Imām Abu Yusuf. Some hold that there is pre-emption, and others say that there is no right of pre-emption. If the purchaser returns the property on account of the options of inspection or condition, then

قالوا لا شفعة للشفيع وان كان المشتري رد الدار بخيار روية او بخيار شرط لا يتجدد للشفيع حق الشفعة حصل الرد قبل القبض اوبعد القبض بترا ضيهما او بغير ترا ضيهما كذا في المحيط - اذا سلم الشفيع الشفعة ثم ان المشتري رد الدار علي البائع ان كان الرد بسبب هو فسخ جديد من كل وجه نحو الرد بخيار الروية وبخيار الشرط وبالعيب قبل القبض بقضاء اوبغير قضاء وبعد القبض بقضاء لا يتجدد للشفيع حق الشفعة وان كان الرد بسبب هو بيع جديد في حق الثالث نحو الرد بالعيب بعد القبض بغير قضاء وبالرد بحكم الاقالة يتجدد للشفيع حق الشفعة واما اذالم يسلم الشفيع

the pre-emptor will not be entitled to pre-empt the property irrespective of the fact whether the return takes place before or after delivery of possession, and whether it was effected voluntarily or not. This is according to the *Muḥīṭ*. If the pre-emptor surrenders his right of pre-emption, thereafter the purchaser returns the property, and if the cause of return is such as renders the sale absolutely void, such as the options of inspection or condition, or the return is on account of a certain defect before taking possession whether by the decree of the Kazi or voluntary, or it is on account of some defect discovered after delivery of possession, by the decree of the Kazi, in all these cases the pre-emptor will not be entitled to pre-empt the property at all. If the return takes place on account of some cause which renders the transaction voidable as between the seller and the purchaser, then it tantamounts to a new transaction with reference to a stranger, *e.g.*, after taking possession the return is effected voluntary on account of some defect, or the return is in accordance with some agreement, then the pre-emptor will be entitled to pre-empt the property

الشفعة حتى فسخ
البا يع والمشتري
العقد بينهما الا يبطل
حق الشفعة سواء
كان الفسخ بسبب
هو فسخ من كل
وجه اوبسبب هو
فسخ من وجه جديد
من وجه كذا في
الذخيرة - واذا
اشترى الرجل
دار ارضا فسلم
الشفيع الشفعة
ثم ان البائع
والمشتري تصادقا
ان البيع كان تلجئة
ورد المشتري الدار
علي البائع لايتجدد
للشفيع حق الشفعة
لان بعد تسليم
الشفعة لم يبق
للشفيع حق اصلا
فاقرار هما لا يتضمن
بطلان حقه فتثبت
التلجية با اقرار
هما فكان الرد بسبب
التلجئة فلا يتجدد
به حق الشفيع وفي
المنتقى رجل اشترى
دار او قبضها وسلم
الشفيع الشفعة ثم

de novo. If the pre-emptor does not give up his right of pre-emption until the seller and the purchaser mutually rescind the sale, then the right of pre-emption will not be extinguished. It is immaterial whether the cancellation took place on account of some cause, which renders the transaction absolutely void, or which renders the transaction voidable, or renders it as if sale *de novo*. This is according to the *Zakhīra*. If a person purchases a house or land, and the pre-emptor relinquishes his right, thereafter, the seller and purchaser mutually allege that the sale was a mere agreement between them, and the purchaser returns the house to the seller, then the pre-emptor has no right of pre-emption afresh, for no right of pre-emption survives after its relinquishment, and further mere agreement does not give rise to pre-emption, and this was a mere agreement according to their own admissions, and hence the pre-emptor has no right of pre-emption. It is reported in the *Muntaqā* that if a person purchases a house and takes its possession, and the pre-emptor surrenders his right of pre-emption, thereupon the purchaser says, "I have purchased it for another," while

ان المشتري قال
انما كنت اشتريتها
لفلان وقال الشفيع
لا بل اشتريتها
لنفسك و هذا منك
بيع مستقبل و انا
آخذها بالشفعة
بهذا البيع فالقول
قول الشفيع فان
كان فلان غائبا لم
يكن الشفيع ان
ياخذ الدار حتي
يقدم الغائب و إن
قال المشتري انا اقيم
البينة ان فلانا كان
امرني بذلك و اني
اشتريتها له لم تقبل
بينتهعلى ذلك حتى
يحضر فلان كذا
في المحيط- ولوسلم
الشفيع الشفعة ثم
جعل المشتري للبائع
خيار يوم جاز فان
نقض البائع البيع
في ذلك اليوم لا
يتجدد للشفيع
حق رواه بن سماعة
عن محمد ؒ و روي
الحسن عن ابي
حنيفة ؒ و ابن
سماعة عن ابي
يوسف ؒ ان فيه
الشفعة كذا في
محيط السرخسي -

the pre-emptor says, "No, you have purchased it for yourself, and now you are selling it again. So I will pre-empt the house under this new sale," then in this case, the word of the pre-emptor would be accepted. However if the vendee were absent, the pre-emptor will not be entitled to pre-empt it until he turns up. And if the purchaser says, "I will adduce proof that I purchased this house under the order of that person," then such evidence will not be admissible unless that person presents himself. This is according to the *Muhīt*. If the pre-emptor relinquishes his right of pre-emption, thereafter the purchaser allows a day's option to the seller, such option is lawful; if the seller cancels the sale during that period, then Ibn Samā'a reports that according to Imām Muhammad the pre-emptor will not be entitled to demand pre-emption *de novo*, but, Hasan bin Ziyād reports from Imam Abu Hanifa and Ibn Samā'a also reports from Imām Abu Yusuf that the pre-emptor will be entitled to demand pre-emption. This is according to the *Muhīt* of *Sarakhsī*.

الباب .
الخامس عشر
في شفعة اهل الكفر-
١١٤ - اذا اشترى
نصرانى من نصراني
دارا بميتة اودم فلا
شفعة للشفيع اشترى
ذمى من ذمى دارا
بخمر و تقابضا ثم
صار الخمر خلا ثم
اسلم البائع والمشتري
ثم استحق نصف
الدار و حضر الشفيع
اخذا لنصف بنصف
قيمة الخمر ولا ياخذ
بنصف الخل ثم
يرجع المشتري علي
البائع بنصف الخل
ان كان الخل
قائما فى يده وان
كان مستهلكا رجع
عليه بمثل نصف
الخل كذا في
المحيط -

CHAPTER XV

Of pre-emption by non-Muslims

114. If a Christian exchanges a house from another Christian for a carrion or for blood, the (Muslim) pre-emptor is not entitled to pre-empt it.[1] If a *Zimmī*[2] purchases a house from another *Zimmī* for wine, and they mutually interchange possession, subsequently the wine turns into vinegar, and both the seller and the purchaser embrace Islam, meanwhile half of this house is reclaimed by another person on proof of ownership, thereafter the pre-emptor turns up, then he will be entitled to pre-empt half the house for half the value of the wine, but cannot take for half the value of the vinegar. The purchaser would reclaim half the vinegar from the seller if still unconsumed, and if the seller

[1] It seems that the author contemplates that this transaction takes place between non-Muslim aliens residing in a Muslim State, for a Christian subject of a Muslim State is known as a *Zimmi* and in this case there is a right of pre-emption.
All non-Muslim subjects of a Muslim State are under the protection of the law in the same way as Muslim subjects.

ولو اشترى ذمي
من ذمي دارا
بخمر او خنزير و
شفيعها ذمي او
مسلم وجبت الشفعة
عند اصحابنا
ثم اذا وجبت الشفعة
فان كان الشفيع
ذميا اخذ الدار
بمثل الخمر وبقيمة
الخنزير و ان كان
مسلما اخذ هابقيمة
الخمر والخنزير
كذا في البدايع -
دار بيعت بخمر
و لها شفيعان
مسلم و كافر اخذ
الكافر نصفها به
نصف الخمر و اخذ
المسلم نصفها
بنصف قيمة الخمر
وان كان الثمن
خنازير اخذ كل
واحد بنصف القيمة
كذا في محيط
السرخسي - وان كان
شفيعها مسلما و ذميا
فاسلم الذمي
اخذها بنصف
قيمة الخمر كما لو

has consumed it, the purchaser would claim an equal amount of similar vinegar. This is according to the *Muḥīṭ*. If a *Zimmī* exchanges a house from another *Zimmī* for wine or for a pig and the pre-emptor is either a *Zimmī* or a Muslim, then according to our jurists (Hanafi) the right of pre-emption arises. If the pre-emptor is a *Zimmī*, then he will pre-empt the house for the equivalent quantity of similar wine or for the value of the pig; but if the pre-emptor is a Muslim, then he will pre-empt the house for the value of the wine or the pig. It is so mentioned in the *Badāy'i*. A house is exchanged in lieu of wine and it has two pre-emptors, one being a non-Muslim, and the other a Muslim. The non-Muslim will pre-empt half the house for half the quantity of similar wine, while the Muslim will pre-empt the other half for half the value of the wine. If the exchange is in lieu of a pig, then each pre-emptor will pre-empt for half the value of the pig. This is according to the *Muḥīṭ* of *Sarakhsī*. If there are two pre-emptors of a house, one is a Muslim and the other is a *Zimmī*, subsequently the *Zimmī* embraces Islam, then the *Zimmī* is also entitled to pre-empt half the house for half the

كان مسلما عند العقد ولا تبطل شفعته هكذا في الكافي - واذا اسلم احد المتبايعين والخمر غير مقبوضة والدار مقبوضة او غير مقبوضة انتقض البيع ولكن لايبطل حق الشفيع في الشفعة فياخذها الشفيع بقيمة الخمر ان كان هو مسلما او كان الماخوذ منه مسلما وان كانا كافرين اخذها بمثل ذلك الخمر وان كان اسلام احد المتعاقدين بعد قبض الخمر قبل قبض الدار فالبيع بينهما يبقي صحيحا واذا باع الذمي كنيسة او بيعة او بيت نار فالبيع جائز وللشفيع فيها الشفعة كذا في المبسوط -

value of the wine, as he would have been entitled to do so, had he been a Muslim at the time of sale. This is according to the *Kāfī*. If a house is exchanged for wine and either the seller or purchaser embrace Islam before possession of wine is taken, then the sale will be cancelled whether possession of the house has been delivered or not, but the pre-emptor's right of pre-emption will not be invalidated, and hence, if the pre-emptor were a Muslim or the person from whom he demands pre-emption were a Muslim, the pre-emptor will be entitled to pre-empt the house for the value of the wine, and if both were non-Muslims, then the pre-emptor will pre-empt in lieu of an equal quantity of similar wine. If after delivery of wine and before taking possession of the house either the seller or purchaser embrace Islam, then the transaction of exchange remains valid. If a *Zimmī* sells[1] a *Kanisa* or *Bey'at* or *Baitunnar*, the sale is valid and the right of pre-emption arises. This is according to the *Mabsūṭ*.

[1] Places of worship of the Christians, Jews and Parsees respectively.

115. If a *Murtadd*[1] purchases a house and afterwards he is put to death, nevertheless the pre-emptor's right will not be annulled, because the right of pre-emption appertains to the sale of the property which has already taken place, and any subsequent effect on the contract cannot invalidate the right of pre-emption. If a *Murtadd* sells the house and afterwards is put to death or he retires into *Dār-ul-Harb*,[2] then according to Imâm Abu Ḥanifa the right of pre-emption does not arise. This is according to the *Muḥiṭ* of *Sarakhsī*. If a *Murtadd* again becomes a Muslim before he retires into *Dār-ul-Harb*, then the sale will be deemed to be valid, and the right of pre-emption will arise. If after entering *Dār-ul-Harb* and after the distribution of his property, the *Murtadd* seller becomes a Muslim, then no right of pre-emption will arise; but according to the two disciples the sale will be considered lawful and the right of pre-emption will arise, it is immaterial whether he embraces Islām or retires into *Dār-ul-Harb*. If a Muslim

١١٥ - ولو اشتري المرتد دارا ثم قتل لم تبطل شفعة الشفيع لان الشفعة متعلقة بخروج المبيع وقد خرج وانفساخ العقد بعده لايوجب بطلان الشفعة ولو باع المرتد ثم قتل او لحق بدار الحرب لا شفعة فيها عند ابي حنيفةؒ كذا في محيط السرخسي - و ان اسلم المرتد البائع قبل ان يلحق بدار الحرب جاز بيعه و للشفيع فيها الشفعة ولو كان اسلامه بعد ما لحق بدار الحرب وقسمة ما له لم يكن للشفيع فيها شفعة و عند ابي يوسف و محمدؒ بيعه جائز وللشفيع فيها

[1] A Muslim who has renounced Islam.

[2] All non-Muslim States are denominated as *Dār-ul-Harb*, while Muslim States are known as *Dār-ul-Islām*.

الشفعة اسلم
او لحق بدار
الحرب واذا اشتري
المسلم دارا او المرتد
شفيعها و قتل في
ردّته او مات او لحق
بدار الحرب فلا
شفعة فيها له ولا
لورثته ولو كانت
امراة مرتدة و وجبت
لها الشفعة فلحقت
بدار الحرب بطلت
شفعتها وان كانت
المرتدة بائعة الدار
فللشفيع الشفعة
وان كان الشفيع
مرتدا او مرتدة
فسلم الشفعة جاز
ولو لم يسلم وطلب
اخذ الدار بالشفعة
لم يقض له القاضي
بذلك الا ان
يسلم فان ابطل
القاضي شفعته ثم
اسلم فلا شفعة
له وان وقفه القاضي
حتي ينظر ثم
اسلم فهو علي
شفعة وهذا اذا
كان طلب الشفعة
حين علم بالشراء
فان لم يكن طلب
الي ان اسلم
فلا شفعة له لتركه
طلب المواثبة بعد

purchases a house, and its pre-emptor is a *Murtadd* who is put to death on account of having renounced the faith, or he dies a natural death, or retires into *Dār-ul-Harb* then his right of pre-emption is thereby extinguished, and his heirs will not be entitled to claim pre-emption. If a woman *Murtadd* has the right of pre-emption and she retires into *Dār-ul-Harb* her right will be annulled. If such woman *Murtadd* sells a house, the pre-emptor has a right to pre-empt it. If a *Murtadd* whether male or female were a pre-emptor and he or she relinquishes his or her right of pre-emption, such relinquishment will be lawful; and if he or she does not surrender the right and demands the property in pre-emption, then the Kazi will not pass a decree of pre-emption in his or her favour, but if he or she again embrace Islām, then the Kazi will decree pre-emption, but if the Kazi has already annulled his or her right of pre-emption, thereafter he or she again become Muslim, then they will have no right of pre-emption. If the Kazi allows time for the *Murtadd* to think over the matter, thereafter he or she accepts Islam, then the right of

علمه بالشراء ولو لحق المرتد بدار الحرب ثم بيعت الدار قبل قسمة ميراثه كان لورثته الشفعة و اذا اشتري المرتد دارا من مسلم او ذمي بخمر فالبيع باطل ولا شفعة فيها كذا في المبسوط -

pre-emption arises provided pre-emption was demanded immediately on receiving the information of sale, but if no demand was made until he or she again become Muslims, then the right of pre-emption had been extinguished because pre-emption was not demanded immediately after the information. If a *Murtadd* enters into *Dār-ul-Harb*, and a part of his property is sold before the distribution of his property among his heirs, then the right of pre-emption will arise in favour of his heirs. If a *Murtadd* exchanges a house in lieu of wine from a Muslim or a *Zimmī*, then since such an exchange is void no right of pre-emption will arise. This is according to the *Mabsūṭ*.

١١٦ - و اذا اشتري الحربي المستامن دارا و لحق بدار الحرب فالشفيع علي شفعته متي لقيه لان لحاقه بدار الحرب كموته و موت المشتري لا يبطل شفعة الشفيع كذا في المحيط - و اذا اشتري

116. If a *Harbī Mustāmin*, alien,[1] purchases a house, and subsequently retires into *Dār-ul-Harb*, then the pre-emptor would retain his right of pre-emption, and he may demand pre-emption whenever he meets the vendee, because his retirement into *Dār-ul-Harb* amounts to his civil death, and civil death of the purchaser does not extinguish the right of pre-emption. This is according to the *Muḥīṭ*. If a Muslim purchases a house

[1] Those aliens who are protected by the Islamic law.

المسلم في دار الاسلام دارا وشفيعها حربي مستامن فلحق بدار الحرب بطلت شفعته علم بالشراء اولم يعلم واذا اشتري الحربي المستامن دارا و شفيعها حربي مستامن فلحقا جميعا بدار الحرب فلا شفعة للشفيع فيها لان لحاق الشفيع بدار الحرب كموته فيما هو في دار الاسلام والدار في دار الاسلام وان كان المشتري مع الشفيع في دار الحرب فان كان الشفيع مسلما او ذميا فدخل دار الحرب فهو علي شفعته اذا علم فان دخل وهو يعلم فلم يطلب حتي غاب بطلت شفعته واذا طلب الشفعة ثم عرض له سفر الي دار الحرب او الي غيرها فهو علي شفعته اذا كان علي طلبه واذا كان الشفيع حربيا

in *Dār-ul-Islam* and its pre-emptor is a *Harabī Mustāmin*, and he has retired into *Dār-ul-Harb*, then thereby his right of pre-emption will be annulled; it is immaterial whether he was informed of the sale or not. If a *Harbī Mustāmin* purchases a house, and the pre-emptor also is a *Harbī Mustāmin*, and thereafter both retire into *Dār-ul-Harb*, then the pre-emptor will have no right of pre-emption, because his retirement into *Dār-ul-Harb* is like civil death of a person in *Dār-ul-Islām*, for the house is in *Dār-ul-Islām*. If both the pre-emptor and the purchaser are in *Dār-ul-Harb*, and the pre-emptor is either a Muslim or a *Zimmī* who has retired into *Dār-ul-Harb* seeking protection, then on being informed of sale he will have the right of pre-emption, and if he subsequently returns into *Dār-ul-Islām*, being aware of the sale, nevertheless he does not demand pre-emption, and again goes away, then his right of pre-emption will be annulled; but if he demands pre-emption, thereafter he undertakes a journey to *Dār-ul-Harb* or to any other place, then he will retain his right of pre-emption. If the pre-emptor is a *Harabī Mustāmin*, and he

مستامنا فوكل بطلب الشفعة ولحق بدار الحرب فلا شفعة له كما لو مات بعد التوكيل بطلب الشفعة وان كان الشفيع مسلما او ذميا فوكل مستامنا من اهل الحرب ثم دخل الوكيل بدار الحرب بطلت وكالته والشفيع علي شفعته لان لحاق الوكيل بدار الحرب كموته و موت الوكيل يبطل الوكالة ولا يبطل شفعة الموكل فكذلك لحاقه كذا في المبسوط - و اذا اشتري المسلم دارا في دار الحرب و شفيعها مسلم ثم اسلم اهل الدار فلا شفعة للشفيع يجب ان يعلم ان كل حكم لا يفتقر الي قضاء القاضي فدار الاسلام ودار الحرب في حق ذلك الحكم علي السواء و كل حكم يفتقر الي قضاء

engages an agent to demand pre-emption, and he himself retires into *Dār-ul-Harb* then his right will be annulled in the same way as it would be if the pre-emptor were to die after appointing an agent. If the pre-emptor is a Muslim or a *Zimmī* and he appoints a *Harabī Mustamin* as his agent, and the agent retires into *Dār-ul-Harb*, then the agency is terminated, but the right of the pre-emptor still survives, because the retirement of the agent into *Dār-ul-Hārb* is like his civil death, and the death of the agent puts an end to the agency and not to the right of pre-emption of the principal. This is according to the *Mubsūt*. If a Muslim purchases a house in *Dar-ul-Harb* and its pre-emptor is also a Muslim, and afterwards all the people of *Dār-ul-Harb* embrace Islam, even then the pre-emptor will have no right of pre-emption. It should be noted that all rights, which require no decree of the Kazi for perfection, accrue independently both in *Dār-ul-Harb* and in *Dār-ul-Islām*, but all rights which are perfected by the decree of the Kazi do not arise in favour of Muslims in *Dār-ul-Harb*. The examples of the former case are sale and purchase,

القاضي لايثبت هذا الحكم في حق من كان من المسلمين في دار الحرب لمباشرة سبب ذلك الحكم في دار الحرب نظير الاول جواز البيع والشراء وصحة الاستيلاء و نفاذ العتق و وجوب الصوم والصلواة فان هذه الاحكام كلها من احكام الاسلام وتجري علي من كان في دار الحرب من المسلمين و نظير الثاني الزنا فان المسلم اذا زني في دار الحرب ثم صارهي دار الاسلام لا يقام عليه الحد كذا في المحيط -

institution of slavery, emancipation prayers and fasting. All these equally apply to all Muslims in *Dār-ul-Harb*, and an example of the latter is *Zinā* (illicit connection with a woman), hence if a Muslim residing in *Dār-ul-Harb* commits *Zinā*, thereafter that *Dār-ul-Harb* becomes a *Dār-ul-Islām*, then he would not be subject to *Hadd*[1] punishment. This is according to the *Muhīt*.

---

[1] The prescribed punishment of 100 stripes under the Muslim Law.

الباب
السادس عشر
في الشفعة في المرض
١١٧ - واذا اشتري المريض دار بالفي درهم و قيمتها الف درهم و له سوى ذلك الف درهم ثم مات فالبيع جائز و للشفيع فيها الشفعة لانه انما حاباه بقدر الثلث و صح ذلك منه في حق الاجنبي فيجب للشفيع فيها الشفعة وان باعها بالفين و قيمتها ثلثة آلاف و شفيعها اجنبي فله ان ياخذها بالفين كذا في المبسوط - باع المريض دارا بالف وقيمتها الفان ولا مال غيرها يقال للمشتري ان شئت خذ بثلثي الفين و الا فدع

CHAPTER XVI

OF PRE-EMPTION DURING SICKNESS.

117. If a patient purchases a house for two thousand *dirhams* whereas the actual value of the house is 1000 *dirhams*, and besides that he had with him one thousand *dirhams* more, thereafter he died, in this case the sale is deemed lawful, and the pre-emptor will be entitled to pre-empt it, because the patient may be deemed to effect a *mahābāt*,[1] concession purchase, and paid intentionally one-third of the price more, and this cannot affect the right of pre-emption. If a patient sells a house worth 3,000 *dirhams* for two thousand *dirhams*, and its pre-emptor is a stranger,[2] then he has the right to take the house for two thousand *dirhams*. This is according to the *Mabsūṭ*. A patient sells a house worth 2,000 *dirhams* for 1,000 *dirhams* and he has no other property except this, then the purchaser will be asked to take the house for two-thirds of 2,000 *dirhams* or give up the sale; and the

[1] A sale where the object is not to make gain, it is in the nature of a special concession, in this case it is a case of purchase at an increased price, but usually it is a case of sale at a reduced price. A Muslim is entitled to make bequests to the extent of $\frac{1}{3}$ of the net assets, hence it is presumed that he can suffer loss voluntarily to the extent of $\frac{1}{3}$ of his property.

[2] In the sense that he is not an heir.

والمشفيع ان ياخذها
بالف وثلث الف
كذا في محيط
السرخسي واذا باعها
بالفين الى اجل
و قيمتها ثلثة آلاف
درهم فالاجل باطل
ولكن بتخيير المشتري
بين ان يفسخ
البيع او يودي
الالفين حالة ليصل
الي الورثة كمال
حقهم واي ذلك
فعل فللشفيع
الشفعة ياخذها
بالفي درهم حالة
وان باعها بثلثة
الاف درهم الى
سنة وقيمتها الفا
درهم ثم مات
اجمعوا على ان
الاجل فيما زاد على
الثلث باطل ولكن
اختلفوا انه يعتبر
الاجل في الثلث
باعتبار الثمن او
باعتبار القيمة قال
ابو يوسف رح باعتبار
الثمن فيعجل بثلثي

pre-emptor is also entitled to take the house for 1,000 and one-third of 1,000.[1] This is according to the *Muḥīṭ* of *Sarakhsī*. If a patient sells a house worth 3,000 for 2,000 on credit for a specified period, then the condition of credit is invalid, but the purchaser has an option to cancel the sale or pay 2,000 *dirhams*, so that the deceased's heirs may benefit, and irrespective of the fact whatever course the purchaser adopts, the pre-emptor will be entitled to take the house on immediate payment of 2,000 *dirhams*. If the patient sells a house worth 2,000 on a credit of one year, for 3,000, and then died, then all jurists (Ḥanāfī) agree that as regards one-third of the amount the payment may be deferred, but there is difference of opinion as to what is this one-third, *i.e.*, whether it would be considered with respect to the value of the house or the amount agreed to be paid for it. Imām Abu Yusuf holds that it would be determined with respect to the amount agreed, that is, two-thirds of the sale consideration, *i.e.*, 2,000 must be paid, immediately, and the remaining 1,000 may

[1] $\frac{2}{3}$ of $2000 = 1333\frac{1}{3}$; 1000 and $\frac{1}{3}$ of $1000 = 1000 + 333\frac{1}{3} = 1333\frac{1}{3}$.
Though the value of the property is 2000 but only $\frac{2}{3}$ is demanded immediately, because $\frac{1}{3}$ can be remitted under the law in virtue of the rule that a Muslim can suffer loss voluntarily to the extent of $\frac{1}{3}$ of this property.

الثمن و ذلك الفا
درهم ان شاء
والالف الثالثة الي
اجله وقال محمد رح
باعتبار القيمة
فيعجل بثلثي القيمة
و ذلك الف و ثلث
مائة و ثلثة و ثلثون
و ثلث ان شاء
والباقي عليه الي
اجله كذا في
المحيط - المريض
اذا باع الدار
من وارثه بمثل
قيمتها و شفيعها
اجنبي لا شفعة له
لان بيع المريض
من وارثه في مرض
الموت عينا من
اعيانه فاسد عنده
الا اذا اجازت
الورثة وان كان
بمثل القيمة و عندهما
جائز فيجب ولو
باعها من اجنبي
والوارث شفيعها لا
شفعة للوارث عنده
ايضاً لانه يصير
كانه باعها من
وارثه ابتداء و عندهما
تجب الشفعة هذا
اذا باع بمثل

be paid on the expiration of the period of credit. But Imām Muḥammad is of opinion that this one-third will be reckoned with respect to the actual value of the house *i.e.*, he should pay $1333\frac{1}{3}$[1] immediately and the remaining *i.e.*, $1666\frac{2}{3}$ on the expiration of the period. This is according to the *Mūḥīṭ*. If the patient sells a house for a price equal to its full value to his heir, and if its pre-emptor is a stranger, then he will not be entitled to pre-empt it, because according to Imām Abu Ḥanifa such sale, by a patient in his death sickness, of his property to his heir, even if it is for its full value, is considered *fāsid* invalid, unless other heirs give their consent to it, but according to the two disciples it is valid, and hence the right of pre-emption will arise. If the patient sells the house to a stranger while the heir is its pre-emptor, then according to Imām Abu Ḥanifa there will be no pre-emption, because if pre-emption is allowed it will really mean a sale of house by the patient to the heir; whereas the two disciples hold the opposite view, and this view applies

[1] *i.e.*, $\frac{2}{3}$ of $2000 = 1333\frac{1}{3}$; and $1333\frac{1}{3} + 1666\frac{2}{3} = 3000$.

القيمة فاما اذا باع وحابى فان باع بالفين وقيمته ثلثة آلاف فان باع من الوارث و شفيعها اجنبي فلا شك انه لا شفعة له عند ابي حنيفة رح وعندهما البيع جائز ولكن يدفع قدر المحاباة فتجب الشفعة هكذا في البدائع – و الا صح ما ذهب اليه ابو حنيفة رح كذا في المبسوط –

only where the patient sold the house for a price equal to the full value of the house. If the house is sold for a reduced price, *e.g.*, a house worth 3,000 is sold for 2,000, and if it is sold to an heir and the pre-emptor is a stranger, then evidently according to Imām Abu Ḥanifa he will not be entitled to its pre-emption, but the two disciples consider the sale as valid provided the reduction in the price is made up, and hence the right of pre-emption will arise. This is according to the *Badāyi'*. The correct view is that of Imām Abu Ḥanifa. This is according to the *Mabsūṭ*.

١١٨ – ولو باع من اجنبي فكذلك لا شفعة للوارث عند ابي حنيفة رح لكن الشفيع ياخذها بتلك الصفقة بالتحول اليه بصفقة متبدلة مقدرة سواء اجازت الورثة اولم تجز لان الاجازة محلها العقد الموقوف والشراء وقع نافذا من المشتري لان المحاباة قدرا لثلث وهي نافذة في

118. If a patient sell a house to a stranger at a reduced price, even then according to Imām Abu Ḥanifa the heirs will not be entitled to pre-empt it; but the pre-emptor will be entitled to pre-empt the house at an increased price, as if it were a fresh transaction. It is immaterial whether the heirs give their consent or not, because their consent is essential only in cases where it is necessary to give validity to the sale. In a *mahābāt* sale at a reduced price of some property, say of the value of

الالفين فلغت في
حق المشتري
فتلغوا في حق
الشفعة هكذا في
البدائع - ولوكان
احد الشفيعين
وارثا اخذها الآخر
ولو كان البيع
في الصحة فاخذ
الوارث بالشفعة
ثم حط البيع في
مرضه لم تجز
الا باجازة باقي
الورثة ولو كان
الحط قبل اخذ
الوارث فان اخذ
بطل الحط وان
ترك صح كذا
في التاتار خانية
ناقلا عن العتابية -
مريض باع داره
بالفي درهم
و قيمتها ثلثة آلاف
ولا مال له غيرها
ثم مات و ابنه
شفيع الدار فلا
شفعة للابن فيها
لانه باعها من
ابنه بهذا الثمن
لم يجز و ذكر في
كتاب الوصايا ان

3000 at 2,000 *dirhams*, only one-third reduction is permissible under the law, but since this reduction cannot be availed of by the vendee, so it is useless for the pre-emptor. This is according to the *Badāyi'*. If there are two pre-emptors and one of them is an heir, then the other pre-emptor is also entitled to pre-emption. If the patient sells his house in good health and the heir pre-empts it, later on the seller reduces the price in sickness, such reduction would be invalid, except in that case where the remaining heirs give their consent. But if this reduction is effected before the heir demands pre-emption, then if the heir pre-empts the reduction would be deemed to be invalid, but if he does not demand pre-emption, it would remain valid. This is according to the *Tātār Khāniya* as stated in the *'Itabiyya*. A patient sells a house worth 3,000 *dirhams* for 2,000, and he has no other property except that house; thereafter he died and his son happens to be the pre-emptor of that house, then he would not be entitled to pre-empt it, because if the patient had sold the house for such a price to his son, the sale would have been unlawful. But it is reported in the

على قولهما له ان
ياخذها بقيمتها ان
شاء والا صح ما
ذكر هنا فانه نص
في الجامع على
انه قولهم جميعا
كذا في المبسوط -
و لو كان له
مال غيرها فاجازت
الورثة فله الشفعة
اتفاقا كذا في شرح
مجمع البحرين -
واذا باع المريض
دارا وحابي
فيها ثم بري
من مرضه والشفيع
وارثه فان لم
يكن علم بالبيع
حتي الآن فله ان
ياخذها بالشفعة
لان المرض اذا
تعقبه برء فهو
بمنزلة حالة الصحة
وان كان قد علم
بالبيع ولم يطلب
الشفعة حتي بري
من مرضه فلا شفعة
له كذا في المبسوط -

Book of Wills that according to the view of the two disciples the son would be entitled to pre-empt it on payment of a price equal to its value, and this is the correct view, and it is expressly stated in the *Jāmi'*, that this view is adopted by all the jurists. This is according to the *Mabsūṭ*. If the patient has some other property besides that house, then according to all jurists with the consent of the heirs he would be entitled to pre-empt it. This is according to the *Sharḥ Majma'-ul-Baḥrayn*. If a patient sells his house at reduced price *muhābāt* sale, and thereafter he recovers from sickness and his heir happens to be its pre-emptor, then if the heir has not yet been informed about the sale, he can pre-empt it; because the sickness from which a patient recovers is not considered as death illness, however if the heir knew of the sale and had not demanded pre-emption, until the patient recovered, then he will not be entitled to pre-emption. This is according to the *Mabsūṭ*.

الباب السابع عشر

فى المتفرقات

١١٩ - ذكر محمد رح في الجامع الكبير ان الشفيع اذا باع بعض داره التي يستحق بها الشفعة مشاعا غير مقسوم بعد بيع الدار المشفوعة لا تبطل به شفعته وكذلك ان باع بعضها مقسوما مما لايلي جانب الدار المبيعة لا تبطل به شفعته وان باع بعضها مقسوما مما يلي المبيعة تبطل به شفعته دار ان طريقهما واحدي الدارين بين رجلين والاخري الرجل خاصة باع صاحب الخاصة داره فللاخرين الشفعة بالطريق فان اقتسما الدار المشتركة فاصاب احدهما بعض الدار مع كل الطريق الذي كان لهما واصاب الاخر بعض الدار بلا طريق و فتح الذي لا طريق له نصيبه

CHAPTER XVII.

OF MISCELLANEOUS CASES.

119. It is reported by Imām Muḥammad in the *Jāmaī 'Kabīr* that if the pre-emptor sells an undivided portion of his house by reason of which he demands pre-emption in some property sold, then his right of pre-emption is not annulled. Similarly if he sells a partitioned part of the property not adjacent to the property sold, his right will remain intact. But if he sells the partitioned portion adjacent to the property sold his right will be extinguished. If there are two houses with a common passage, and one house has two co-owners, while the other house has one owner; now the latter house is sold, then both the two co-owners are entitled to pre-empt it on account of the right of common passage. But if they (the co-owners) divide their house in such a manner that one receives a portion of the house and the entire passage, while the other receives a portion of the house without the passage, and the person in whose share the passage has been allotted, opens a door in some public road, here again both of them are *Shafī'-i-Jār* to the house sold. But as regards pre-

بابا الي الطريق
الاعظم وهما جميعا
جار ان للدار التي
بيعت فالذي صار
الطريق له احق
بشفعتها فان سلم
هو الشفعة اخذه
الاخر بالجوار ولا
تبطل شفعة بسبب
هذه القسمة كذا
في المحيط - لواخذ
الشفيع الارض
بالشفعة فبني فيها
اوغرس ثم استحقت
و كلف المستحق
الشفيع بالقلع فقلع
البناء والغرس رجع
الشفيع علي المشتري
بالثمن ولا يرجع
بقيمة البناء والغرس
لا علي البائع ان
كان اخذها منه
ولا علي المشتري
ان اخذها منه
معناه لا يرجع بما
نقص بالقلع كذا
في التبيين -

١٢٠ - والشفعة
عندنا علي عدد
الرؤس اذا كانت
دار بين ثلثة
نفر لاحدهم نصفها
ولآخر ثلثها ولآخر
سدسها فباع صاحب

emption the person in whose share the common passage is assigned will be preferred; and if he should relinquish his right, then the other will be entitled to pre-empt it in the capacity of *Shafī'-i-Jār*. Thus the partition effected has not extinguished his right. This is according to the *Muḥīṭ*. If a pre-emptor pre-empts a certain land and constructs a building on it, or plants trees therein, thereafter some person on proof of his ownership reclaims the land, and desires the pre-emptor to demolish the building or uproot the plants, in this case the pre-emptor will be entitled to take the price of the land from the purchaser, but he is not entitled to the value of the building or of the plants, no matter whether he took the land from the seller or the purchaser, and this means that he cannot claim damages suffered by destruction of the building or the plants. This is according to the *Tabyīn*.

120. Pre-emption according to our jurists is decreed equally among the claimants. When a mansion is owned by three persons, one of whom has a half share in it, the other a third, and the other a sixth, and the owner of the half having sold his share, it is demanded

النصف نصيبه و طلب الآخران الشفعة قضي بالشقص المبيع بينهما نصفان وان باع صاحب السدس قضي بينهما نصفان في الكل ولو اسقط بعضهم فهي للباقين للكل علي عددهم ولو كان البعض غائبا يقضي بها بين الحضور علي عددهم واذا قضي للحاضر بالكل ثم حضر آخر قضي له بالنصف ولو حضر ثالث قضي له بثلث ما في يد كل واحد فلو سلم الحاضر بعد ما قضي له بالكل لا ياخذ القادم الا بالنصف كذا في الكافي - رجل زعم انه باع داره من فلان بكذا ولم ياخذ الثمن فقال

in pre-emption by the other two sharers, then pre-emption is to be decreed between them equally in halves, or if the owner of the one-sixth share should sell his share, it is similarly to be divided equally between the other two sharers. If some of the pre-emptors relinquish their right, then the entire property will be decreed equally among the rest of the pre-emptors. If some of the pre-emptors were absent, then the property will be decreed to the pre-emptors present. And if the whole property has been decreed to a present pre-emptor, and thereafter an absent pre-emptor appears, then he will also be entitled to half of the property pre-empted, and if a third absent pre-emptor appears, then he would also be entitled to one-third of the property. If a pre-emptor after decree is passed in his favour gives up his right of pre-emption, thereafter an absent pre-emptor appears, then he will be entitled to half the property only. This is according to the *Kāfī*.[1] If a person says, "I have sold my house to a certain person for so much price, and I have not received the price." But the purchaser says, "I have not purchased the

[1] But the surrender of the right of pre-emption by one of the pre-emptors before the decree will entitle others to claim the whole property.

فلان ما اشتريتها
منك كان للشفيع
ان ياخذها بالشفعة
هذا اذا اقرانه
باع من فلان و فلان
حاضر ينكر الشراء
فاما اذا كان
غائبا فلا خصومة
للشفيع مع المشتري
كذا في المحيط — دار
بجنب دار رجل بيعت
والجار يزعم ان
رقبة الدار المبيعة
له ويخاف انه لو
ادعي رقبتها تبطل
شفعته وان ادعي
الشفعة لا يمكنه
دعوي الدار انها
له ماذا يصنع
حتي لا تبطل شفعته
قالوا يقول هذه
الدار داري دانا
ادعي رقبتها فان
وصلت اليها الا
فاذا علي شفعتي
فيها لان هذه
الجملة كلام واحد
فلم يتحقق السكوت
عن طلب الشفعة
كذا في فتاوي

house from you," nevertheless the pre-emptor will be entitled to pre-empt that house, and such effect will follow wherever the seller admits that he had sold the house and the purchaser, who is present, denies its purchase. But if the purchaser were absent, the pre-emptor would have no cause of action against him. This is according to the *Muḥīṭ*. If a house which is adjacent to that of *Shafi'-i-Jār* is sold, and he (*Shafi'-i-Jār*) doubts whether the house sold is his property, and is afraid that if he claims the house as his property, his right of pre-emption will be invalidated because the owner of the house cannot be its pre-emptor, and also that if he demands pre-emption, then he would be unable to claim ownership. What should he do in this case so that his right of pre-emption is not invalidated? The jurists hold that he should say, "This house is mine, and I am the claimant of the house as my property, if I succeed so much the better, otherwise, I demand pre-emption in it." As this is a complete and continuous expression no indifference (*sukūt*) as to the right of pre-emption can be inferred at all from the very nature of such a demand. This is according to the *Fatawā-i-*

قاضي خان - عن ابي يوسف ؒ اذا ادعاها فقال بينتي غيب ولكني آخذها بالشفعة فهو اقرار ان البائع مالك فلا تقبل بينة بعد ذلك و عنه انه تبطل الشفعة بدعوى الملك ولو ادعي النصف وقال اقيم البنية و آخذ الباقي بالشركة جاز كذا في التاتار خانية -

Kazi Khān.[1] It is reported from Abu Yusuf, that if the pre-emptor claims ownership of the property subject of pre-emption but says, "My witnesses are absent, so I rather pre-empt the house," then this amounts to the admission that the vendee is its owner; thereafter the evidence tendered will not be relied upon. It is reported from Abu Yusuf, that the claim of ownership *ipso facto* invalidates the right of pre-emption. But if the pre-emptor claims ownership of half of the house and says, "I shall adduce proof and shall pre-empt the other half by reason of partnership, then it is deemed lawful. This is according to the *Tātār Khāniyya.*

١٢١ - رجل له دار غصبها غاصب فبيعت دار بجنبها والغاصب والمشتري جاحد ان الدار والشفعة ينبغي له ان يطلب الشفعة حتى اذا اقام البينة علي الملك تبين ان الشفعة ثابتة فاذا طلب خاصم

121. A person has a house which is wrongfully possessed by another person, *ghāsib* usurper, thereafter an adjacent house is sold, and the *ghāsib* as also the purchaser deny the ownership of the pre-emptor and his right of pre-emption respectively, nevertheless the pre-emptor should make the demands of pre-emption, so that later on when he establishes by proof the ownership of the house usurped, then his right of pre-emption would be deemed to have accrued. And when he files the

[1] In British India it is possible to make such an alternative claim vide 25 A. L. J. R, 48; and 36 All., 476.

الغاصب الي القاضي
ويخبر القاضي
علي صورة الامر
فبعد ذلك ينظر
ان اقام البينة
قضي له بالدار
وبالشفعة في الدار
الاخري لان الثابت
بالبينة كالثابت
معاينة وان لم
يقم بينة حلفهما
جميعا فان حلفا
لا يقضي له باحدي
الدارين وان نكلا
قضي له بالدارين
وان حلف الغاصب
و نكل المشتري
لا يقضي بالدار
المغصوبة ويقضي
له بالشفعة وان
كان علي العكس
فالحكم علي العكس
لان النكول اقرار
واقرار كل مقر
حجة في حقه خاصة
كذا في محيط
السرخسي -
١٢٢ - واذا اشتري
دار اولها شفيع
فبيعت دار بجنب
هذه الدار فطالب
المشتري بالشفعة
وقضي له بها ثم

suit for pre-emption he should summon the *ghāṣib* before the *Kazi*, and if he succeeds in his case, then the ownership of the house usurped and pre-emption in the other house will be decreed, because the fact has been established by the evidence. However if the pre-emptor produces no proof, then the Kazi will ask the usurper and the purchaser to swear, and if they both swear, then he would not pass a decree against either of them in respect of the house, but if they both refuse to swear, then a decree would be passed in favour of the pre-emptor for ownership of one house and for pre-emption in the other. However if the *ghāṣib* swears, while the purchaser refuses to swear, then no decree will be passed against him (*ghāṣib*), but pre-emption will be decreed in the house sold and *vice versa*, because refusal to swear amounts to an admission and is binding on that person. This is according to the *Muhīt* of *Sarakhsī*.

122. If a house is sold which has a *Shafi'-i-Jār*, later on another adjacent house is sold, and the (new) purchaser demands pre-emption which is decreed in his favour, thereafter the *Shafi'-i-Jār* turns up, then pre-emption of the house sold first will be decreed in his favour, but

حضر الشفيع يقضي له بالدار التي بجواره ويمضي القضاء في الثانية للمشتري ولو كان الشفيع جاراً للدارين والمسئلة بحالها يقضي له بكل الدار الاولى والنصف في الثانية كذا في البدائع – وروي عن ابي يوسف رح فيمن اشترى نصف دار ثم اشترى آخر نصفها الآخر فخاصمه المشتري الاول فقضي له بالشفعة بالشركة ثم خاصمه الجار في الشفعتين فالجار احق بالشراء الاول ولا حق له في الثاني تعلق قضاء القاضي به وكذلك لو اشترى نصفها ثم اشترى نصفها ولو كان المشتري للنصف الثاني غير المشتري للنصف الاول فلم يخاصمه فيه حتى اخذ

the decree of pre-emption of the second house will hold good in favour of the purchaser. But if this pre-emptor were a *Shafi'-i-Jār* of both the houses respectively in the same manner, then a decree for the whole of the house first sold, and half of the second house will be passed in his favour. This is according to the *Badā'i'*. It is reported from Abu Yusuf that if a person purchases first half of a certain house, and the other half is purchased by another person, thereafter the first purchaser demands pre-emption from the other purchaser, and the Kazi decrees pre-emption in his favour on account of his being a *Sharīk*, and later on a certain *Shafi'-i-Jār* claims pre-emption in both transactions, then he will be entitled to pre-empt the first sale but not the second sale, because a decree of the Kazi has already been passed with respect to it. Similarly, if a purchaser first purchases one half of a house and subsequently the other half, the effect will be the same. But if the purchaser of the second half is a different person, and the first purchaser does not claim pre-emption from him, meanwhile a *Shafi'-i-Jār* demands pre-emption in the first sale, then in this case the same

الجار النصف الاول فالجار احق بالنصف الثاني كذا في المحيط - الاصل ان الشفعة انما تستحق بملك قائم وقت الشراء لا بملك مستحدث لان السبب هو اتصال الملكين فيعتبر قيامه وقت الشراء واذا اخذ يكون بمنزلة الاستحقاق فان كان بقضاء ثبت في حق كافة الناس وان كان برضاء ثبت في حقهما خاصة اشتري دارا بالفين وتقابضاء فادعي آخر و صالحه المشتري علي خمسمائة علي انكار فاخذ الشفيع من المشتري بالبيع الاول رد المدعي ما قبض علي المشتري لان القاضي لما قضي بالشفعة فقد قضي يكون

Shafi'-i-Jār will also be preferred as regards pre-emption of the second sale. This is according to the *Muḥiṭ*. The fact is that the right of pre-emption arises by reason of ownership of (adjacent) property at the time of sale, and not by reason of ownership which accrues afterwards, because the object of pre-emption is conjuction, the 'union of two ownerships,' hence its existence is essential at the time of sale, and the property pre-empted become one's own property. And if the property is pre-empted by a decree of the Kazi, it will hold good against the world, but if pre-empted by mutual agreement, it will be binding only upon the parties to the contract. A house is purchased for Rs. 2000, and on payment of money its possession is delivered to the purchaser, thereafter another person claims that house, and the purchaser denies the claim, but finally the case is compromised on payment of Rs. 500, later on a certain person pre-empts the house on first sale under the decree of Kazi, then the claimant should return to the purchaser the amount given to him, because since the decree of pre-emption has been passed by the Kazi, it has also been conclusively established by the same

الدار ملك للبائع فتبين انه لا خصومة بينه و بين المدعي و ظهر ان المدعي اخذ مالا لا بازاء حقه ولا بازاء دفع الخصومة فانتقض الصلح ولو اخذ الشفيع بغير قضاء لا يرد لان الاخذ حصل بتراضيهما وتراضيهما حجة في حقهما لا في حق غيرهما فيجعل كبيع جديد جرى بينهما فظهر انه لا خصومة بينهما كذا في محيط السرخسي -

decree, that the house had actually belonged to the seller, therefore it is evident that there was no cause of action for the claimant as against the purchaser, hence what the claimant received was not lawful, nor was it in course of litigation, consequently the compromise was void. But if the pre-emptor were to pre-empt the property by mutual agreement, then the claimant will not be bound to return the 'compromise-consideration,' because a mutual agreement is binding upon the parties, though it is not binding on other persons, and further the transaction is treated as a new sale between the parties to the agreement. This is according to the *Muḥīṭ* of *Sarakhsī*.

١٢٣ - ولو ان رجلا ورث دارا فبيعت دار بجنبها فاخذها بالشفعة ثم بيعت دارا اخرى بجنب الدار الثانية ثم استحقت الدار الموروثة و طلب المستحق الشفعة فانه ياخذ

123. A person inherits some property, thereafter an adjacent house is sold. He thereupon pre-empts the adjacent house, later on another house adjoining the first house is sold. Meanwhile the property inherited has been taken away by some other person, on establishment of his right of ownership. This new owner now demands pre-emption, and is held

الدار الثانية
و يكون الوارث
احق بالدار
الثالثة هكذا ذكر
القدوري ولم يذكر
ما اذا لم يطلب
المستحق الشفعة
و ذكر في المنتقي
ان الدار الثانية
ترد علي المقضي
عليه بالشفعة يعني
الذي كان اشتراها
الثالثة تترك في
يدي الذي هي
في يديه كذا في
الظهيرية - رجل
اشتري دارا وقبضها
فاراد الشفيع
اخذها فقال المشتري
بعتها عن فلان
وخرجت من يدي ثم
اودعنيها لا يصدق
ولا يجعل خصما
للشفيع وان اقام
البنية علي ذلك
لاتسمع بينة وكذلك
لو قال وهبتها لفلان
و قبضها ثم او
دعنيها لا يقبل
قوله و لو اقام
علي ذلك بينة
لا تسمع بنية فان
حضر المشتري في

to be entitled to pre-empt the first house, and similarly he will pre-empt the third house provided he has a preferable claim. This view is stated by Imām Qudūrī, but he does not state as to what would be the effect if this new owner does not demand pre-emption. But it is stated in the *Muntaqa*, that the first house would remain with its previous purchaser against whom the decree of pre-emption could be passed; and the other house would remain with the person who has its possession at the time. This is according to the *Zahiriyya*. A person after purchasing a house takes its possession, thereupon the pre-emptor demands pre-emption. However the vendee says, "I have sold it to such and such person and it is no longer my property, but it has again been entrusted to me," then his statement will not be accepted, and he will be made a party to the suit instituted by the pre-emptor, and even if he produces witnesses, such evidence will not be accepted. Similarly if he says, "I have made a gift of the house to such and such person who after taking its possession has entrusted it to me," then such a statement will not be accepted; and if he adduces proof to this

الفصل الاول
والموهوب له في
الفصل الثاني وكان
ذلك بعد قضاء
القاضي للشفيع
واقام البينة علي
الشراء او علي
الهبة لا تسمع
البينة وكان القضاء
بالشفعة نقضا علي
الشراء والهبة لان
صاحب اليد صار
مقضيا عليه فكل
من ادعي تلقي
الملك من جهة
صاحب اليد صار
مقضيا عليه دار
في يد رجل اشتراها
من فلان نقد
الثمن والدار
تعرف لفلان وادعي
فلان انه وهبها
للمدعي واراد ان
يرجع في الهبة
فالقال قول فلان
فان لم يقض القاضي
للواهب بالرجوع
حتي حضر شفيع
الدار فهو احق
بالدار من الواهب
وان لم يحضر
الشفيع قضي القاضي
بالرجوع للواهب
فاذا قضي له

effect the proof also will not be accepted. However, if in the first case the purchaser turns up and in the second case, the donee appears, after the Kazi had already decreed pre-emption in favour of the pre-emptor, then the evidence of the purchaser to establish purchase, or that of the donee to establish gift, will not be admissible, for the decree of pre-emption by the Kazi has really cancelled both these transactions of purchase and gift, because a decree passed against the person in possession of the house is also deemed to be a decree against any person claiming ownership through him. If a house is in possession of A, and he alleges that he purchased it from B; while B alleges that he made a gift of that house to A. If B wants to take back the house, then his words would be accepted, but if before the decree of Kazi in favour of the donor is passed, a certain pre-emptor turns up, then he will have a preferential right in the house as against the donor, but if no pre-emptor appears, then the Kazi will pass a decree in favour of the donor revoking his gift. And when such a decree has been passed, thereafter the pre-emptor turns up, then

بالرجوع ثم حضر
الشفيع نقض الرجوع
وردت الدار علي
الشفيع ولو كان
صاحب اليد ادعي
انه اشتراها من
فلان علي ان
فلانا بالخيار ونقده
الثمن وادعي فلان
الهبة و التسليم
و حضر الشفيع
اخذها بالشفعة
وبطل الخيار لان
صاحب الدار بما
اقر بالهبة والتسليم
الي صاحب اليد
فقد اقر بثبوت
الملك له اسقط
فيه الخيار وصاحب
اليد مقر بالشراء
فثبتت الشفعة
باقرار صاحب اليد
بالشراء عند سقوط
خيار صاحب الدار
وفي الاصل اذا كانت
الدار في يد البائع
و قضي القاضي
للشفيع بالشفعة
علي البائع فطلب
الشفيع من البائع
الا قالة فاقالة
البائع اقالة جائزة
و تعود الدار الي
ملك البائع ولا
تعود الي ملك

the order of revocation of gift will be cancelled, and the house will be given to the pre-emptor. If A alleges, "I purchased this house from B subject to his option, and I have paid the price for it," while B alleges, "I have made a gift of the house and delivered possession thereof to A"; thereafter, if the pre-emptor turns up, then he will be entitled to pre-empt it, and the option will terminate, because when B admits that after he made a gift of the house he delivered the possession, his admission really amounts to admitting the ownership of the possessor; hence this admission makes B's option void and A has admitted his purchase, thus thereby the right of pre-emption is established in favour of the pre-emptor. It is stated in the *Kitāb-ul-Aṣl* that if the house pre-empted were in the possession of the seller, and the Kazi passed a decree of pre-emption against the seller, and thereupon the pre-emptor returns the house to the seller, such a return *Iqāla*, to the seller will be lawful, and the house will pass into the ownership of the seller, and not into that of the purchaser. And it will be considered so far as the purchaser is concerned, as a fresh purchase of the

المشتري ويجعل
في حق المشتري
كان البائع اشترى
الدار من الشفيع
وكذلك ان كانت
الدار في يدالمشتري
وقضي القاضي بالدار
للشفيغ قبل ان
يقبض الشفيع
الدار من المشتري
ان اقال مع البائع
صحت الاقالة
و صارت الدار ملكا
للبائع في قول
ابي حنيفة رح كذا
في المحيط -

house by the seller from the pre-emptor. Similarly if the house pre-empted were in the possession of the purchaser, and the decree of pre-emption is passed, and the pre-emptor after pre-empting the house from the purchaser, but before taking its possession returns the house to the seller, such a return *Iqāla* is lawful, and according to Imām Abu Hanīfa the house will become the property of the seller. This is according to the *Muḥīṭ*.

١٢٤ - اذا مات
الشفيع بعد ماقضي
القاضي له بالشفعة
قبل ان يقبض
الدار و قبل ان
ينقض الثمن كانت
الدار لورثة الشفيع
لان قضاء القاضي
بالشفعة بمنزلة البيع
ولو مات الشفيع
بعد ما اشتري
الدار كانت الدار
ميراثا لورثة ولو
قضي القاضي بالشفعة
و طلب المشتري
من الشفيع ان
يرده الدار علي
المشتري بزيادة في
الثمن والزيادة من

124. If the pre-emptor after the decree of the Kazi is passed in his favour, but before he takes possession of the house, and has paid the price, were to die, then the right of pre-emption will pass to his heirs, because the decree of pre-emption is like a sale; and since the pre-emptor had died after pre-empting the house, the house pre-empted will be considered to be the property of his heirs. If a Kazi has passed a decree of pre-emption, and the purchaser asks the pre-emptor to give him back the house on payment of a higher price, and the augmentation of the price is settled to be in kind or it is otherwise, and the pre-

جنس الثمن او من غير جنسه تصير الدار للمشتري بالثمن الاول و تبطل الزيادة لان رد الدار علي المشتري بمنزلة الاقالة والاقالة انما تكون بالثمن الاول وكذالو طالب المشتري من الشفيع بعد ما قضي القاضي له بالشفعة ان يرد الدار علي البائع بزيادة في الثمن ففعل كانت اقالة والاقالة كما تكون بين البائع والمشتري تتحقق بين البائع والشفيع كذا في فتاوی قاضي خان -

۱۲۵ - واذا مات الشفيع بعد البائع قبل ان ياخذ بالشفعة لم يكن لوارثه حق الاخذ بالشفعة عندنا ولو كان بيع الدار بعد موته كان له فيها الشفعة كذا في المبسوط واذا مات البائع والمشتري والشفيع حي

emptor gives his consent, then the house will pass to the purchaser on payment of the original price, and the excess will be invalidated, because the return of the house to the purchaser is like *Iqāla* and *Iqāla* can take place only at the original price. Similarly if the Kazi decrees pre-emption in favour of the pre-emptor, thereupon the purchaser asks the pre-emptor to restore the house to the seller on payment of an extra amount, and the pre-emptor agrees, this would also amount to an *Iqāla*, and it will hold good equally in case of the seller and pre-emptor, as it does in the case of the purchaser and the pre-emptor. This is according to the *Fatawa-i-Kazi Khān*.

125. If the pre-emptor dies after the sale has taken place but before actually pre-empting the house,[1] then according to us (*Hanafi* Law), his heirs will not be entitled to pre-empt it. But if the sale were to occur after the pre-emptor's death, his heirs will be entitled to pre-empt it. This is according to the ***Mabsūṭ***. If the seller and the purchaser were to die, but the pre-emptor is alive, then he is entitled to pre-emption. This

[1] Before the decree of the Court.

is according to the *Fatawa-i-Kazi Khān*. If the purchaser were to die but the pre-emptor is alive, then also he is entitled to pre-emption. Similarly if the deceased were in debt, then this house need not be put to sale for satisfaction of his debt, but the pre-emptor is allowed to pre-empt it notwithstanding the rights of the debtor. This is according to the *Muhīt*. If the Kazi or the executor of the deceased were to sell the house to discharge the debt of the deceased, nevertheless the pre-emptor will be entitled to exercise his right, and the sale will be invalidated; similar will be the case if the purchaser himself had sold it in his lifetime. Similarly if the deceased left the house by will, the pre-emptor will enforce his right of pre-emption and the will will become void. This is according to the *Mabsūt*. A person, after making the first two demands of pre-emption,[1] dies, the right of pre-emption will not pass to his heirs. This is according to the *Sirājiyya*. If the pre-emptor becomes

فللشفيع الشفعة كذا في فتاوي قاضي خان - و اذا مات المشتري والشفيع حي فللشفيع الشفعة وان كان علي الميت دين لاتباع الدار في دينه واخذها الشفيع بالشفعة وان تعلق بالدار حق العزيم والشفيع كذا في المحيط - فان باعها القاضي او الوصي في دين الميت فللشفيع ان يبطل البيع و ياخذها بالشفعة كما لو باعها المشتري في حيوته وكذلك لو اوصى فيه بوصية اخذها الشفيع و بطلت الوصية كذا في المبسوط - اثبت الشفعة بطلبتين ومات فليس للوارث اخذها بالشفعة كذا في السراجية - ولو كان

---

[1] *Talab-i-Muwasabat* and *Talab-i-Ishhad*.

الشفيع قد ملكها بتسليم المشتري اليه ثم مات يكون ذلك ميراثا لورثته هكذا في السراج الوهاج -

the owner of the house after taking possession from the purchaser, and thereafter he dies, then the house will be inherited by his heirs. This is according to the *Sirāj-ul-Wahhāj.*

١٢٦ - واذا حط البائع عن المشتري بعض الثمن سقط ذلك عن الشفيع وكذا اذا حط بعد ما اخذ الشفيع بالثمن يحط عن الشفيع حتى يرجع عليه بذلك القدر وكذا اذا ابراه عن بعض الثمن او وهبه له فحكمه حكم الحط وياخذه الشفيع بما بقي واذا حط عنه جميع الثمن لم يسقط عن الشفيع وهذا اذا كان حط الكل بكلمة واحدة واما اذا كان بكلمات ياخذها

126. If the seller remits a portion of the price in favour of the purchaser, the price will also be remitted to that extent in favour of the pre-emptor. Similarly if the pre-emptor pre-empts the house on payment of the price, and thereafter the seller remits a portion of the price in favour of the purchaser, the price will be remitted to that extent in favour of the pre-emptor also, that is, the pre-emptor will be entitled to claim back the price so remitted by the seller in favour of the purchaser. Similarly if the seller releases the purchaser from paying a portion of the price or makes a gift of it to him, the same deduction will be made in favour of the pre-emptor as in the above cases. But if the seller remits the whole of the price to the purchaser, then the pre-emptor is not entitled to the whole remittance, this effect follows only if the whole price were remitted at the same time, for if it were remitted in parts,

بالاخيرة كذا في السراج وهاج-واذا زاد المشتري البايع في الثمن لم تلزم الزيادة الشفيع حتي انه ياخذها بالثمن الاول كذا في الجوهرة النيرة - رجل اشترى دارا من رجل بالف درهم وتقابضا ثم زاده في الثمن الفا آخر من غير ان يتناقضا البيع ثم علم الشفيع بالالفين ولم يعلم بالالف فاخذها الشفيع بالفين بحكم او بغير حكم فان اخذها بحكم ابطله القاضي ثم قضي له ان ياخذها بالشفعة بالالف لانه كان قضاء له بغير ما وجبت به الشفعة وان اخذها بغير حكم فهذا شراء مبتدا فلا ينقض و في جامع الفتاوى ولو اشترى دارا

then the pre-emptor will be entitled to pre-empt the house on payment of the last part of the price remitted. This is according to the *Sirāj-ul-Wahhāj.* If the purchaser increases the price in favour of the seller, then this excess will not be binding on the pre-emptor, who will be entitled to pre-empt it on payment of the original price. This is according to the *Jawhar-un-Nayyira.* A person purchases a house from another person for 1000 *dirhams,* and takes its possession and pays the amount, subsequently he increases the sale-consideration by 1000 *dirhams* for the seller without cancelling the sale, thereafter the pre-emptor is informed that the sale has taken place for 2000 *dirhams*, and being ignorant of the fact that the sale was originally for 1000 *dirhams* only, the pre-emptor pre-empts the house on payment of 2000 *dirhams*, whether by the decree of the *Kazi* or by mutual agreement. Now in the former case since the pre-emptor pre-empted the house by the decree of the Court, the *Kazi* will set aside the decree, and pass a fresh decree for 1000 *dirhams* only, because the first decree was passed on a misunderstanding, and hence it cannot be

فوهبها لرجل ثم جاء الشفيع ياخذ الدار ويضع الثمن على يدي عدل عند ابي يوسف رح وعند محمد رح لا ياخذ حتى يحضر الواهب كذا في التاتار خانية -

binding, and in the latter case since the house was pre-empted under an agreement, it tantamounts to a fresh transaction, and therefore cannot be cancelled. It is stated in the *Jama'i Fatāwā* that if a person after purchasing a house makes a gift of it to another person, thereafter the pre-emptor appears, then according to Imām Abu Yusuf the pre-emptor is entitled to pre-empt that house and deposit its price with a trustworthy person. But, according to Imām Muḥammad, the pre-emptor cannot pre-empt the house, until the donor is brought before the Court. This is according to the *Tatār Khāniyya*.

١٢٧ - مكاتب مات عن وفاء ثم بيعت دار بجواره فاوى ورثته كتابته فلهم الشفعة لانه حكم بحريته في آخر حياته فثبت جوارهم قبل البيع كذا في الكافي - رجل اشترى دارا ولها شفيع فقال الشفيع اجزت البيع وانا اخذ بالشفعة او قال

127. A certain slave *mukatib* dies leaving sufficient property to discharge *kitābut*, agreed compensation for emancipation, subsequently a house adjoining this property is sold. His heirs duly discharge *kitābut* so they are entitled to pre-empt the house sold. This is so, as the deceased was emancipated at his death, and the heirs were *Shafi-'i-Jār* at the time of the sale of the house. This is according to the *Kāfi*. A person purchases a house which has a pre-emptor. The pre-emptor says, " I allowed the sale, and

رضيت بالبيع وانا آخذ بالشفعة او قال سلمت البيع وانا آخذ بالشفعة و في الفتاوى او لا حق لي فيها فهو علي شفعة اذا وصل واذا فصل وسكت ثم قال انا آخذ بالشفعة فلا شفعة له كذا في التاتار خانية -

now I shall pre-empt the house," or he says, "I consented to the sale and now I desire to pre-empt the house." Or he says, "I permitted the sale, and now I shall pre-empt the house"; and similarly according to the *Fatāwā* if the pre-emptor says, "I have no right in this house," then in all these cases he retains his right of pre-emption provided these statements were one and continuous and without pause, otherwise his right of pre-emption would be annulled. This is according to the *Tātār Khāniyya.*

١٢٨ - عن محمد رح رجل اشترى من آخر دارا و جاء شفيع الدار وادعى انه كان اشترى هذه الدار من البائع قبل شراء هذا المشتري فاخبر المشتري بذلك و دفع الدار الي الشفيع ثم قدم شفيع آخر وانكر شراء الشفيع اخذ الدار كلها بالشفعة واذا قال المشتري

128. It is reported from Imām Muḥammad that a person purchases a house from another person, and the pre-emptor claims that he (pre-emptor) had previously purchased the same house from the seller before it was sold to the purchaser, now the purchaser corroborates this statement, and hands over the possession of the house to him; thereafter another pre-emptor appears, and he denies the purchase, by the first pre-emptor, then this new pre-emptor will be entitled to pre-empt the whole house.[1] If in the above example at the beginning the purchaser says to the pre-emptor

[1] Because the first pre-emptor appears to be conniving with the purchaser, and is thus deemed to have forfeited his right of pre-emption. It is also possible that the new pre-emptor has a superior claim.

"You had purchased the house before I purchased it and it is yours accordingly," and the pre-emptor says, 'I had not purchased it, but I now per-empt it,' and thereupon he took the house from the purchaser under pre-emption, and later on another pre-emptor appeared; this new pre-emptor will be entitled to pre-empt only half[1] of the house. This is according to the *Muhīt*. A person purchases a house, and says, "I purchased it for another person" and tendered evidence on this point, thereafter the pre-emptor appears, then the purchaser should be made a party to the pre-emption suit; but if the purchaser had produced evidence to the effect that he acted simply as an agent for another person, then he need not be made a party to the suit. If the seller and the agent say, "We have mutually transacted the sale of this house for one thousand *dirhams* and one *ratl* of wine," and the pre-emptor denies it and says, "The sale actually took place for 1000," then the statement of the pre-

للشفيع ابتداء قد كنت اشتريت هذه الدار قبل شرائي وهي لك بشرائك و قال الشفيع ما اشتريتها وانا آخذها لشفعتي فأخذها الشفيع من المشتري ثم قدم الشفيع الاخر فليس له الا نصفها كذا في المحيط - اشتري دارا و قال اشتريتها لفلان واشهد ثم جاء الشفيع فهو خصم له الا ان يقيم بينته ان فلانا وكله فحينئذ لا يكون خصما ولو قال العاقد ان تبايعنا بالف و رطل من خمر و قال الشفيع بل بالالف فالقول للشفيع وفي شرح الطحاوي الوكيل بالشراء اذا اشتري فحضر

[1] It seems that both pre-emptors belong to the same class.

emptor will be relied upon. It is reported in *Sharḥī-i-Ṭahāvī* that if an agent purchases a house, thereafter the pre-emptor appears, then he would lawfully pre-empt the house from the agent, and the presence of the principal is not necessary. This is according to the *Zahiriyya*. A person exchanges a house for a slave, and then he found the slave to be one-eyed person, but he acquiesced in the transaction. Nevertheless the pre-emptor must pre-empt the house for the value of a sound slave. Similarly if the slave is returned on account of some defect found in him, the same principle will apply; because the transaction was effected with respect to a sound slave and not on the basis of a defective slave. This is according to the *Muḥīṭ* of *Sarakhsī*. A person purchases some property in lieu of some uncounted lots consisting of *dirhams*, and the seller and the purchaser did not ascertain the number of *dirhams*, and after mutual transfer of possession, these *dirhams* were lost by the seller. In such

الشفيع ياخذ
الوكيل ويكتب
العهدة عليه ولا
يلتفت الي حضور
الموكل كذا في
الظهيرية- اشتري دارا
بعبد فوجد العبد
اعور فرضيه فالشفيع
باخذ الدار بقيمة
صحيحا و كذلك
لورده بالعيب لان
البيع حين وقع
وقع بالعبد سليما
لا معيبا كذا في
محيط السرخسي -
رجل اشتري عقارا
بدراهم جزافا واتفق
المتبايعان علي
انهما لا يعلمان مقدار
الدراهم وقد هلكت
في يد البائع
بعد التقابض
فالشفيع كيف يفعل
قال القاضي الامام
ابو بكر ياخذ
الدار بالشفعة ثم
يعطي الثمن علي

زعمه الا اذا اثبت المشتري الزيادة عليه كذا في الظهيرية -

a case how is the pre-emptor to act? Kazi Imām Abu Bakr observes that the pre-emptor should pre-empt the house by paying the price according to his own estimation of the value of the house, unless the purchaser proves that the price should be more than what the pre-emptor has estimated. This is according to the *Zahīrīyya.*

١٢٩ - رجل له ارض كثيرة المؤن والخراج لايشتريها احد فباعها من انسان مع دار له قيمتها الف بالف وللدار شفيع ياخذها بحصتها من الثمن فيقتسم الثمن علي قيمة الدار و قيمة الارض ان اشتراها اصحاب السلطان وان كانت لا يرغب فيها احد يعتبر قيمتها آخر وقت ذهب رغبات الناس عنها لان القسمة تعتمد القيمة

129. A person has a plot of land which is heavily taxed because of rent taxes and revenue, *khīrāj* and therefore no one cares to purchase it. The owner sells the land along with his house worth 1000 *dirhams* for 1000 *dirhams* only. Now if there is a pre-emptor of this house, he will be entitled to pre-empt the house for a price equal to its value. That is the whole price will be divided between the value of the house and that value of the land, which would be offered by the officers of the State, if they were to purchase it. And if no person is inclined to purchase the land, then its value will be that for which it was sold last, before it had ceased to attract purchasers, in short proportionate value should be estimated, and consideration money should

be divided proportionately after the ascertainment of the value of things. This is according to the *Quniyya*. However according to Imām Abu Hanīfa if the land is found to be of no value, then the price of the house will be 1000 *dirhams*. This is according to the *Muḥīṭ*. It is reported from Imām Abu Yusuf in the *Muntaqa* that if a person is in possession of certain property, and the Kazī knows that it is his property, thereafter some property adjacent to it is sold, and subsequently this pre-emptor says, "This house of mine is really the property of such and such person to whom I sold it a year ago," since this admission was made by the pre-emptor at such a time, that he could pre-empt the adjacent property, if he had so desired, his right of pre-emption will thereby be extinguished, and the person in whose favour the admission is made is also not entitled to pre-empt the house, unless he adduces proof to the effect that he had previously purchased the house, because an admission is operative only against the person who makes it, and it confers no benefit on a third person. This is according to the *Muḥīṭ* of *Sarakhsī*. It is stated in *Fatāwā-i-Itabīyya*, that if a person purchases some property

كذا في القنية -
و يمكن ان
يقال علي قول
ابي حنيفة ؒ يجعل
كل الالف بمقابلة
الدار اذا لم تكن
للضيعة قيمة اصلا
كذا في المحيط -
و ذكر في
المنتقي عن ابي
يوسف ؒ رجل في
يده دار عرف
القاضي انها له
فبيعت دار بجنب
هذه فقال الشفيع
بعد بيع الدار
التي فيها الشفعة
داري هذه لفلان
و قد بعتها منه
منذ سنة و قال
في وقت يقدر علي
اخذ الشفعة لو
طلبها لنفسه فلا
شفعة له و لا للمقر
له حتي يقيم
البينة علي الشراء
لان الاقرار حجة
قاصرة تصح في حق
المقر لا في حق
غيره كذا في

محيط السرخسي – و في فتاوي العتابية ولو شرط المشتري الخيار للشفيع فقال اجزت علي ان لي الشفعة جاز وان لم يقل علي ان لي الشفعة بطلت وينبغي ان يوخر حتي يجيز البائع او تمضي المدة كذا في التاتار خانية – شفيع استولي علي الارض من غير حكم ان كان من اهل الاستنباط وقد علم ان بعض الناس قد قال ذلك لا يصير فاسقا وان كان لا يعلم فهو فاسق لانه ظالم بخلاف الاول لانه ليس بظالم كذا في الفتاوي الكبرى –

subject to the option to be exercised by the pre-emptor, and the pre-emptor says, "I allowed the sale, on condition that the right of pre-emption accrues in my favour," then such statement is lawful. But if he did not mention the condition that the right of pre-emption should accrue in his favour, his right thereby will be extinguished. But the proper course for him is to cause delay, so that the seller himself will permit the sale, or the period fixed would expire. This is according to the *Tātār Khaniyya*. A pre-emptor took possession of a certain land without the decree of the *Kazī*; then if he is a *Ahl-i-Istimbat*,[1] and he was aware of the view expressed by some jurists then he will not be guilty, otherwise he will be guilty, because in the latter case, he will be considered to be a trespasser, but in the former case he cannot be deemed to be a trespasser. This is according to the *Fatāwā-i-Kubra*.

١٣٠ – رجل ادعي قبل رجل شفعة

130. A person demands pre-emption against the purchaser by reason of his

[1] A person who understands the law.

being *Shafi-i-Jār*, but the purchaser does not believe in *Shufa 'bil Jawār* and hence he objects. Now the purchaser will be asked to swear thus, "This pre-emptor has no right of pre-emption against me according to the jurists (Hanafi) who recognise *Shufa 'bil Jawār*." If a person purchases a house and before he takes possession of it, another house adjoining it is sold, then he will be entitled to pre-empt it. A person demands a house in pre-emption, and the purchaser says, "I have given the house to you in pre-emption," then if the pre-emptor is aware of the sale consideration, it will amount to a valid transfer, and the house will become his property; but if the pre-emptor is not aware of the price, the house will not become his property, but he will retain his right of pre-emption. This is according to the *Muḥīṭ*. A person died and he left behind a house worth 2000 *dirhams* mortgaged for 1000 *dirhams*. He also leaves a legacy of one-third of his property in favour of a certain person. The Kazī thinks that it is proper to sell the whole house, and if the heir and the legatee are its pre-emptors, then they both will be entitled to pre-empt the house. If the

بالجوار والمشتري
لا يري الشفعة
بالجوار وانكر
الشفعة يحلف
بالله ما لهذا
قبلك شفعة علي
قول من يري
الشفعة بالجوار
رجل اشتري داراً
ولو يقبضها حتي
بيعت دار اخري
بجنبها فللمشتري
الشفعة رجل طلب
الشفعة في دار فقال
له المشتري دفعتها
اليك ان علم
الشفيع بالثمن
وفي هذا الوجه
التسليم صحيح
صارت الدار ملكا
للشفيع واذا لم
يعلم الشفيع بالثمن
لا تصير الدار
ملكا للشفيع وهو
علي شفعته هكذا في
المحيط - رجل ترك
دارا قيمتها الفان
وعليه دين الف
واوصي بثلث ماله
لرجل فراي القاضي

deceased were not in debt, and one of his heirs were a minor, and the Kazī thinks it is proper to sell the whole house, then the legatee and all major heirs will not be entitled to pre-empt it; similarly the minor when he attains majority will not be entitled to pre-empt it. This is according to the *Jami'-i-Kabīr*. Ali Ibn Ahmad was consulted in a case, where a person purchased some property, and the pre-emptor demanded pre-emption in it, thereupon the purchaser agreed, but they differed as to its price, with the result that the pre-emptor did not pre-empt the property, and a long time elapsed. Subsequently if the pre-emptor desires to pre-empt the property on payment of the amount demanded by the purchaser, then he will not be entitled to do so unless the purchaser consents to it; but if it were proved that the real price was the same as the pre-emptor had offered, then his right of pre-emption will not be extinguished. This is according to the *Tātār Khāniyya*. A person is in possession of a house, and a person desires to pre-empt it, and he says, "You have purchased it from such and such person," and that person confirmed this statement, however the person in possession of

بيع الدار كلها
والوارث والموصى
له شفيعان اخذاها
بالشفعة ولو لم
يكن عليه دين
وكان في الورثة
صغير فراي القاضي
بيعها فليس للموصى
له ولا للورثة شفعة
ولا للصغير ان كبر
وطلبها كذا في
الجامع الكبير -
وسئل علي
بن احمد عن
رجل اشترى اوكانا
وطلب الشفيع
الشفعة فسلم اليه
المشتري الشفعة الا
انهما تنازعا في
الثمن فلم ياخذه
والى على ذلك
مدة ثم اراد ان
ياخذ بما قال
المشتري ليس له
ذلك الا ان يرضى
بذلك المشتري وان
كان ثبت ان الثمن
على ما قال الشفيع
فله ذلك ولا تبطل
شفعته اذا صح
ان الثمن على
ما قال الشفيع
كذا في التاتار
خانية - رجل في
يديه دار جاءه

رجل وادعى شفعتها و قال للذي في يده هذه الدار اشتريتها من فلان و صدقه البائع في ذلك و قال الذي في يده الدار ورثتها عن ابي، واقام الشفيع البينة انها كانت لابي البائع مات وتركها ميراثا للبائع ولم يقم البينة على البيع فالقاضي يقول للذي في يديه ان شئت فصدق الشفيع وخذ منه الثمن و تكون العهدة عليك وان ابى ذلك اخذ الشفيع الدار و دفع الثمن و يرد البائع الثمن على المشتري والعهدة على البائع وكذلك لو قال الذي في يديه وهبها لي فلان و قال الشفيع اشتريتها من فلان وصدق البائع المشتري فهو على ما وصفت لك كذا في المحيط -

house says, "I have inherited the house from my father," whereas the pre-emptor adduces proof to the effect that the house belonged to the father of the seller who died, and left it to him in inheritance, but the pre-emptor did not adduce proof to establish the sale, then here the Kazi will ask the person in possession of the house to accept the statement of the pre-emptor, and pay the price, so that the responsibility of the contract will be on him; however if he refuses, the pre-emptor will pre-empt the house, and will pay the price to the seller, who will pay back this price to the purchaser, but the responsibility of the contract now will be upon the seller. Similarly if the person in possession of the house says, "Such and such person has made a gift of the house to me," while the pre-emptor says, "You have purchased it from such and such person" and the seller corroborates the latter statement, then in this case also the same law will be followed. This is according to the *Muhit*.

١٣١ - دور مكة لا يصح بيعها الا

131. The sales of the houses of Mecca are not valid except of their structures,

بناؤها ولا شفعة فيها وروى الحسن عن ابي حنيفة رح انه يجوز بيعها وفيها الشفعة و به قال ابو يوسف رح و عليه الفتوى كذا في القنية في باب وقت ثبوت الشفعة - و في الفتاوى العتابية و لو بني الشفيع ثم وجد بها عيبا رجع بالنقصان و رجع المشتري علي بائعها ايضا ان كان الاول بقضاء و كذا في التاتار خانية - و ان كان المشتري اشتري الدار علي ان البائع بري من كل عيب بها او كان بها عيب علم المشتري بذلك ورضي، كان للشفيع ان لا يرضي بالعيب و يرده كذا في فتاوي قاضي خان -

so they are not subject to pre-emption, but Hasan (Ibn Ziyad) has reported from Imām Abu Hanifa that the sales of the houses of Mecca are valid, and they are subject to pre-emption, and the same view is held by Imām Abu Yusuf, and the *fatwa* accords with this view. This is according to the *Quniyya*. It is mentioned in the *Fatāwā-i-Itābiyya*, that if a pre-emptor constructs and makes improvements in the house pre-empted, thereafter discovers certain defects in the house, then he will be entitled to claim compensation in lieu of such defects from the purchaser, and the purchaser likewise can claim the same amount from the seller, provided he had delivered the house under the decree of the *Kazī*. This is according to the *Tātār Khāniyya*. If the purchaser buys a house on the condition that the seller would not be responsible for the defects, or the purchaser is aware of these defects at the time of sale, nevertheless the pre-emptor would be entitled to return the house because of the defects. This is according to the *Fatāwā-i-Kazi Khān*.

١٣٢ - و في الاصل اشترى دارا وهو شفيعها و لها شفيع غائب و تصدق المشتري بيتا منها و طريقه على رجل ثم باع مابقي منها ثم قدم الشفيع الغائب فاراد ان ينقض صدقة المشتري و بيعه فاذا باع مابقي من الدار من المتصدق عليه ليس له ان ينقض صدقته في كل الدار انما ينقض في النصف واذا باع باقي الدار من رجل آخر كان للغائب ان ينقض تصدقه في الكل و في الاصل ايضا تسليم الشفعة في البيع تسليم في الهبة بشرط العوض

132. It is stated in the *Asl*, that a person purchases an enclosure, of which he himself was the pre-emptor, and there was another pre-emptor also, who was absent at the time of sale. Subsequently the purchaser gives away in *Sadaqah* charity an apartment of the enclosure along with the right of way, to a certain person, and also sells the rest of the enclosure. Thereafter the absent pre-emptor appears and desires to cancel the transaction of *Sadaqah* charity, and sale. Now if he finds that the purchaser had sold the remaining portion to the same person to whom he had given the apartment, then in this case he will not be entitled to cancel the entire *Sadaqah*, but he can do so as regards half of it, but if the seller had sold the rest of the enclosure to any other person, then the absent pre-emptor will be entitled to invalidate the entire *Sadaqah*. It is stated in the *Asl*, that the surrender of the right of pre-emption in the case of sale will be deemed to be a lawful surrender, if it turns out that the sale was really a gift with a condition of return, *Hibā-bi-shartil-'iwaz*. Hence if the pre-emptor were informed that the house was sold, and thereupon he relinquished his

حتى ان الشفيع اذا اخبر بالبيع فسلم الشفعة ثم تبين انه لم يكن بيع و كان هبة بشرط العوض فلا شفعة له وكذلك تسليم الشفعة في الهبة بشرط العوض تسليم فى البيع كذا في المحيط - رجل اشترى دارا و هوشفيعها بالجوار فطلب جارا آخر فيها الشفعة فسلم المشتري الدار كلها اليه كان نصف الدار بالشفعة و النصف بالشراء كذا في الظهيرية -

right of pre-emption, later on, it was found out that it was not a sale, but a *Hibā-bi-shartil-'iwaz*, then the pre-emptor will not be entitled to demand pre-emption. Similarly surrender of the right of pre-emption in *Hibā-bi-shartil-'iwaz* will be deemed a lawful surrender of the right, if it were actually a case of sale. This is according to the *Muḥīṭ*. A person purchases a house of which he is a pre-emptor in the capacity of *Shafi'-i-Jār*. Thereafter another *Shafi'-i-Jār* demands pre-emption, and the purchaser delivers to him the whole house, then half the house will be regarded as taken under pre-emption, and the other half as sold separately. This is according to the *Zahiryya*.

١٣٣ - اذا باع داراً على ان يكفل فلان الثمن وهو شفيعها فكفل لا شفعة له كذا في

133. If a house is sold on the condition, that such and such person, should be a surety for the price, although that person happens to be its pre-emptor, then if he accepts suretyship his right of pre-emption will be

القنية - واذا وقع
الصلح على دين
على دار ثم تصادقا
انه لا دين لا شفعة
للشفيع ولو كان
مكان الصلح بيع
فللشفيع الشفعة
كذا في التاتار
خانية - رجل اشترى
امة بالف وتقابضها
و وجد بها عيبا
ينقصها العشرة فاقر
البائع او جحد
فصالحه على دار
جاز وللشفيع اخذها
بحصة العيب
استحسانا لان
العيب الفائت مال
و لهذا لو امتنع
الرد يرجع بقيمة
النقصان مع ان
الاعتياض عن الحق
لا يجوز ولو اشترى
بحصة العيب شيئا
يجوز فثبت ان
الدار ملكت بازاء
المال وللمشتري ان
يبيعها مرابحة على
كل الثمن و ليس

extinguished. This is according to the *Quniyya*. If a debt is compounded in lieu of a house, and thereafter both the parties (the creditor and debtor) admit that there was no debt at all then the pre-emptor is not entitled to pre-empt the house, but if the composition was in fact a sale transaction, then the right of pre-emption will arise. This is according to the *Tātār Khāniyya*. A person buys a female slave for 1000 *dirhams*, and he took possession of the slave and paid the price. Thereafter he found some defect in the female slave, on account of which the loss was estimated to be $\frac{1}{10}$ of the price, thereupon the seller gave a house by way of composition, and it is immaterial whether he admitted the defect or denied it, then according to the doctrine of *istehsān*, the pre-emptor will be entitled to pre-empt the house in lieu of the $\frac{1}{10}$ of the price, which was estimated as damages in lieu of the defect. However if the seller has not compromised in lieu of the defect, then the purchaser will be entitled to recover the loss from him, though it is deemed not proper to take compensation in lieu of a right, but if the purchaser takes a certain thing by way of compen-

له ان يبيع الدار
والامة مرابحة
بدون البيان فان
وجد المشتري بالدار
عيبا فردها بقضاء
قبل ان ياخذها
الشفيع بطلت شفعته
وعاد المشتري على
حجته في العيب
وله ان يرابح
الامة على كل الثمن
مالم يرجع بالعيب
اشترى دارا او صالح
من عيبها على
عبد اخذها الشفيع
بحصتها فان فعل
فاستحق العبد
او رد بخيار رؤية
او شرط في الصلح
فالشفيع بالخيار ان
شاء ادى حظ
العيب الي المشتري
وان شاء رد الدار

sation for the defect, it would be valid. Thus it is clear that the house was given in lieu of something, therefore the purchaser is entitled to sell it *murabih* at profit, but he can only sell (*murabih*) the house and the slave at profit after pointing out the defect, but if the purchaser on discovering the defect returns it, before the pre-emptor has demanded pre-emption, then no right of pre-emption arises. Similarly as regards the slave girl, the purchaser has the right of return on account of the defect, and unless he has received compensation in lieu of the defect, he would be entitled to sell the slave *murabih* at profit in the ordinary course. A person purchases a house and discovering a defect compromised in lieu of it for a slave, then the pre-emptor will be entitled to pre-empt the house on payment of its proportionate price, and if he pays the whole sale consideration, he

[1] *Murabih* sale means a sale at a certain gain or profit, it is an incident of the sale that a seller may sell his property at any price, generally at some profit, but after having made up the loss (for the defect) by receiving compensation, it is expected that the seller should disclose the defect on a re-sale.

[2] It seems that in this case in spite of re-sale the purchaser would be entitled subsequently to recover compensation in lieu of the defect.

و يكون المشتري علي الحجة مع البائع ان اخذها بالقضاء لانه فسخ في حق الكل وكذا ان كان المشتري رد العبد بعيب بقضاء ولورده برضاء لا شئي علي الشفيع كذا في الكافي -

will be entitled to take the slave also. And if the house was subject to option of inspection or was retained by reason of the compromise, then the pre-emptor would be entitled to compensation, or he may return the house to the purchaser, in the latter case the purchaser would be entitled to exercise all his rights against the seller, provided the house was taken under the decree of the Kazi, inasmuch as the Court had cancelled the rights of all, and the same would be the effect if the purchaser retains the slave on account of defect to the seller by a decree of the Kazī, but if the return was made by mutual agreement, then there is no cause for the pre-emptor. This is according to the *Kāfī.*

١٣٤ - الاستحقاق بحق سابق علي العقد يبطل العقد و بحق متاخر عنه لا يبطله و الشفيع كما يتقدم علي من قام مقام المشتري اشترى دار بالف فزاد المشتري في الثمن او صالح عن دعوى فيها

134. It should be noted that rights which exist prior to the contract of sale can render the contract void, but those which arise subsequent to the contract cannot invalidate it at all, *e.g.*, a person purchases a house for 1000 *dirhams*, and later on increases the price, or a certain person claims its ownership, and the purchaser after denying the claim compromises with him, subsequently the pre-emptor pre-empts the house under the decree

بانكار ثم اخذها
الشفيع بالف بقضاء
رجع المشتري علي
البائع بالزيادة وعلي
المدعي ببدل
الصلح لان الشفيع
استحقها بحق
سابق علي الصلح
او علي الزيادة
فاوجب بطلان
الصلح او الزيادة
من الاصل ولو
سلم المشترى الدار
الي الشفيع بغير
قضاء ففي الزيادة
يرجع علي البائع
و في بدل الصلح
لايرجع علي المدعي
ولو كان المشتري
شفيعها ايضا
فقبضها المشتري
و وهبها لرجل
فلشريكها اخذ
نصفها فاذا اخذ
تبطل الهبة في
النصف الاخر كذا
في التاتار خانية -
رجل شهد بدار
لرجل فردت
شهادته ثم اشتراها

of the Kazī on payment of 1000 *dirhams*, then the purchaser will be entitled to reclaim the amount which he had increased, or what he had paid in lieu of the compromise from the person with whom he compounded, because the pre-emptor was legally entitled to pre-empt the house before the compromise or the augmentation of the price had taken place, in other words the pre-emptor's prior claim has rendered both the transactions, the augmentation of the price and the compromise invalid; but if the purchaser gave the house to the pre-emptor by mutual agreement, then also he will be entitled to claim back the augmentation of the price from the seller, but he will not be entitled to claim back the consideration paid in lieu of compromise. If the purchaser happens to be the pre-emptor of the house, and he after taking possession of the house, made a gift of it to another person, then if there be also another pre-emptor he will be entitled to pre-empt half the house, and as the result of pre-empting the half, the gift of the other half will be rendered void. This is according to the *Tātār Khāniyya*. A person deposes that a certain house be-

الشاهد ولها شفيع
فشفيعها احق من
المقر له فان لم
يكن لها شفيع
ولكن المشتري
اشتراها لرجل امره
بذلك فالدار
للآمردون المقر له
فان اشتراها لنفسه
و الشفيع غائب
فللمقر له ان ياخذ
الدار فاذا اشتري
الدار من المقر له
ثانيا قبل ان
يحضر الشفيع فهو
بالخيار ان شاء
اخذه بالشراء الاول
وان شاء اخذها
بالشراء الثاني ولو
اشتري الدار رجل
آخر من ذي اليد
ثم اشتري الشاهد
من ذلك الرجل
يخير الشفيع فان
اخذها بالبيع الاول
بطل البيع الثاني
و رجع الشاهد
بالثمن علي بائعه
تصادق البائع
و المشتري ان البيع

longs to a certain person, but his deposition was rejected, thereafter the same witness purchases the house, and there is a pre-emptor of the house also, then the pre-emptor will be preferred as against the person in whose favour the deposition was made. If there is no pre-emptor, and the purchaser had purchased the house on behalf of his principal, then the latter will be entitled to the house and not the person in whose favour the deposition was made. And if the purchaser had purchased it for himself, and the pre-emptor was absent, then the person in whose favour the deposition was made will be entitled to take the house from the purchaser. If thereafter the purchaser buys the same house from the person in whose favour the deposition was made, later on the pre-emptor appears, then also he will be entitled to pre-empt the house either on the first or on the second sale. Thus if he pre-empts the first sale the second sale will be rendered void, and the witness vendee will take back his consideration money from his own vendor. If both the seller and purchaser unanimously admit that the sale was merely an agreement between them, or that there was an option in favour

كان تلجئة او كان
فيه خيار البائع
او المشتري و فسخا
العقد لا يصدقان
في حق الشفعة
و له الشفعة امر
بشراء دار عين
بعبد عين للمامور
ففعل صح الشراء
للآمر و رجع المامور
علي الآمر بقيمة العبد
داران متصلتان
لرجلين و كان كل
واحدة من الدارين
مشتركة بينهما
فباع كل واحد
منهما حظه من
هذه الدار بحظ
صاحبه من الدار
الاخرى فالشفعة
لهما دون الجيران
هكذا في الكافي -
دار بيعت و لها
ثلثة شفعاء احدهم
حاضر و طلب
الكل و اخذها ثم
حضر احد الغائبين
فله ان ياخذ نصف
ما في يده فان
صالحه علي الثلث

of either the seller or purchaser, and thereupon they cancelled the sale, then in determining the right of the pre-emptor, the words of the seller and the purchaser will not be accepted, and the pre-emptor will retain his right of pre-emption. A person asks another person (agent) to exchange a certain house in lieu of his slave (of the agent), and the person did so. Here the exchange is valid in favour of the principal, and the agent will be entitled to reclaim the value of the slave from the principal. There are two houses adjoining each other, and each house has two co-sharers, now each sharer exchanges his share in one house for that of the other co-sharer in the adjoining house, here pre-emption will be confined to them only, and the neighbours will not be entitled to it. This is according to the *Kāfi*. A house is purchased which has three pre-emptors, one of them who is present demands pre-emption and pre-empts the whole, thereafter one of the two pre-emptors who were absent appear, then he will be entitled to pre-empt the half of the same property, but if he desires he may compound his claim for one third.

فله ذلك و ان
حضر ذلك الثالث
اخذ من صاحب
الثلث ما في
يده فيضمه الى
ما في يد الاخر
فيقسمانه نصفين
فان كان لهم شريك
رابع اخذ من
صاحب الثلث نصف
ما في يده فيقسمانه
الى ما في يد الاخر
و قسماه اثلاثا يكون

Thereafter if the third pre-emptor appears, he would take from the compounding pre-emptor one third of his share which will be added to the residue, and thereafter it will be divided between the two pre-emptors equally. If there were a fourth pre-emptor also, then half will be taken from the compounding pre-emptor taking one third, and would be added to the residue and then the whole will be divided thus the compounding pre-emptor will take 3 and the other three will take 15 shares, each getting 5.*

* Table of the shares of pre-emptors co-existing with a compounding pre-emptor.

First Pre-emptor	$\frac{2}{3}$	$\frac{7}{18}$	$\frac{5}{18}$
Compounding Pre-emptor	$\frac{1}{3}$	$\frac{2}{9}=\{\frac{1}{3}-(\frac{1}{3}\text{ of }\frac{1}{3})\}=\frac{4}{18}$	$\frac{1}{6}=\frac{1}{3}\text{ of }\frac{1}{2}=\frac{3}{18}$
Third[1] Pre-emptor	...	$\frac{7}{18}$	$\frac{5}{18}$
Fourth[2] Pre-emptor	...	...	$\frac{5}{18}$

[1] The compounding pre-emptor in the ordinary course would have taken one half, but he elected to take one third, now since there are three pre-emptors his legal share $\frac{1}{3}$ will be reduced further thus :

$$\frac{1}{2} : \frac{1}{3} : \frac{1}{3} : ? = \frac{2 \times 1}{3 \times 3} = \frac{2}{9}$$

[2] Now since there are four pre-emptors hence his legal share $\frac{1}{4}$ will be reduced further thus :

$$\frac{1}{3} : \frac{1}{4} : \frac{1}{3} : ? = \frac{2 \times 2}{4 \times 3} = \frac{1}{6}$$

لصاحب الثلث ثلث
فلهم خمسة عشر لكل
واحد خمسة ولو
ان الرابع ظفر
بمن اخذ الثلث
لا غير وقد قسمت
الدار علي ثمانية
عشر اخذ نصف
ما في يده دار لها
ثلثة شفعاء اشتري
اثنان منهم الدار
علي ان لاحدهما
السدس والباقي
للآخر صح الشراط
ولا شفعة لاحدهما
في نصيب الاخر
فان حضر الثالث
قسمت الدار
علي ثمانية عشر
لمشتري السدس
سهمان و لكل واحد
ثمانية و المسئلة
تخرج من تسعة فان
لقي الثالث صاحب
السدس ولم يلق
الآخر اخذ نصف
ما في يده لما عرف وان
لقيا الآخر قسمت
الدار بينهم علي
ثمانية عشر علي

If the fourth pre-emptor finds the compounding pre-emptor and does not find any other pre-emptor, since the house has already been divided into 18 shares, he can now only take one half of one-third that is one sixth. There are three pre-emptors of a house, and two of them purchase the house with a condition that one will take one sixth, while the other will take the remainder, such purchase will be valid, and one of them will not be entitled to pre-empt the share of the other. Thereafter if a third pre-emptor appears, the house now will be divided into 18 shares and 2 shares would be given to the pre-emptor who had consented to take one sixth as stipulated, while the remaining two pre-emptors will get equal shares, *i.e.*, each getting 8 shares,[1] and the figure nine is the basis of the solution. If the third pre-emptor meets only the pre-emptor taking one sixth part, and does not find the second pre-emptor, he will be entitled to half of his share, *i.e.*, one twelfth,[2] but if he also finds the second pre-emptor then the partition will take place in 18 shares as said above. This is according

[1] First pre-emptor $\frac{8}{18}$, third pre-emptor $\frac{8}{18}$, compounding pre-emptor $\frac{1}{6}-(\frac{1}{3} \text{ of } \frac{1}{6})=\frac{2}{18}$.

[2] This is so because there are now only two pre-emptors and they must share equally, as others are absent.

to the *Muḥīṭ* of *Sarakhsī*. A person purchases half of a house, and a *shafi-i-jār* pre-empts it, and has it partitioned by the decree of the Kazī or by an agreement with the seller. Thereafter a pre-emptor who is a sharer in the way (*Shafi'-i-Khalīṭ*) appears, then he will be entitled to pre-empt the whole house from the *Shafi-i-jār*, but the partition effected will remain valid. If a house is purchased and there are two persons who pre-empted it, and mutually divided it. Thereafter a third pre-emptor appears, and if he were not able to find both the pre-emptors, but found one of them, then he will not be entitled to pre-empt half of the share but only ¼ from him.[1] A person says to one of the two pre-emptors, "I have purchased this house for you by your order," and one of the pre-emptors ratified it, while the other pre-emptor denied it, then nevertheless the house will belong to both of them jointly. If the purchaser says, "This house belongs to you; it never belonged to me," or "you had purchased it before me," or "I have made a gift of it to

مامر كذا في محيط
السرخسي-باع نصف
داره و اخذه الجار
و قاسمه بقضاء
او بغيره و حضر
الشريك في الطريق
ياخذ ما في يده
ولا ينقض القسمة
بخلاف ما لو
اشتري دار او اخذ
الشفيعان و اقتسما
ثم حضر الثالث
فان حضر الشفيع
الثالث ولم يلق
الشفيعين بل لقى
احدهما فانه ياخذ
ربع ما في يده
لا نصفه قال المشتري
لاحد الشفيعين
اشتريت الدار لك
بامرك فصدقه
المقرله و كذبه الاخر
فالدار بينهما بالشفعة
وان قال المشتري الدار
لك ولم تكن لي
واشتريتها قبلي او
و هبتك و قبضت
فصدقه المقر له

[1] Because now as in the above two cases we are concerned with two pre-emptors only hence they must divide one-half property equally between themselves, i.e., take ¼ each.

و كذبه الاخر بطلت شفعة و كانت الشفعة كلها للاخر كذا في الكافي -

you, and you had taken possession of it," and one of the pre-emptors corroborates the statement, while the other pre-emptor denies it, here the former pre-emptor will forfeit his right of pre-emption, but the latter will be entitled to pre-empt the whole. This is according to the *Kāfī*.

١٣٥ - واذا باع المفاوض داراً له خاصة من ميراث و شريكه شفيعها بدار له خاصة من ميراث فلا شفعة له فيها كذا في المبسوط - وتسليم احد المتفاوضين شفعة صاحبه بسبب دار له خاصة ورثها جائز كذا في محيط السرخسي -

135. If a *mufāwiz*[1] partner sells his own private house which he inherited, and if the other partner is its pre-emptor by reason of his own private property, nevertheless he will not be entitled to pre-empt the house. This is according to the *Mabsūṭ*. If one of two *mufāwiz* partners relinquishes the other's right of pre-emption, which accrued to him by reason of his own property, then in this case such surrender will be deemed to be valid. This is according to the *Muḥīṭ* of *Sarakhsī*.

١٣٦ - ولو كان المضارب هو الشفيع بدار من المضاربة فيها ربح و ليس

136. If a *muẓārib* partner[2] is the pre-emptor of some house by reason of some *muẓārib* property and he has no other property except the *muẓārib* property, and

[1] *Mufāwīz* are partners who have contributed equal sums in the partnership, and each is held absolutely responsible for the other's acts.

[2] *Muzarib* means a partner who applies his personal labour and *rabul mal* means a partner who supplies his capital in the partnership.

في يده من مال المضاربة غيرها فسلم المضارب الشفعة كان لرب المال ان ياخذها لنفسه و ان سلم رب المال كان للمضارب ان ياخذها لنفسه كذا في المبسوط - اشتري المضارب ببعضها دارا و اشتري رب المال الي جنبها داراً اخرى لنفسه فللمضارب اخذها بالشفعة بما بقي من مال المضاربة كذا في محيط السرخسي واذا اشتري المضارب داربن بمال المضاربة وهو الف درهم يساوي كل واحدة منهما الف درهم فبيعت دار الي جنب احديهما فلا شفعة للمضارب فيها والشفعة لرب المال لان كل واحدة منهما مشغولة فلا ياخذها المضارب بالشفعة و هذا لان الدور لا تقسم

now he surrenders his right of pre-emption, then the *rabul māl* partner will be entitled to preempt the whole house. If the *rabul māl* relinquishes his right of pre-emption, then the *muzārib* partner will be entitled to pre-empt it. This is according to the *Mabsūṭ*. If a *muzārib* partner purchases a house from its partnership's fund, and the *rabul māl* partner purchases another house adjoining the first house for himself, then the *muzārib* partner will be entitled to pre-empt the house purchased by *rabul māl*, out of the income of the *muzārib* property. This is according to the *Muḥīṭ* of *Sarakhsī*. If a *muzārib* partner purchases two houses each of 1000 value out of the *muzārib* fund worth 1000 *dirhams*, thereafter a house adjoining one of them is sold, then the *muzārib* partner will not be entitled to pre-empt it, while *rabul māl* partner will be entitled to pre-empt it. Inasmuch as each of the houses are distinct and separate and the *muzārib* partner cannot pre-empt the house under pre-emption, and it is so because the houses cannot be considered as one unit for they are distinct and each stands separately. But if it were profitable, then

قسمة واحدة لما فيها من التفاوت في المنفعة فيعتبر كل واحدة منهما علي الانفراد و لو كان في احدهما ربح كان له الشفعة مع رب المال لانه شريك فيها بحصة من الربح كذا في المبسوط -

the *muzārib* partner along with *rabul māl* will be entitled to pre-empt proportionately to the share of profits. This is according to the *Mabsūṭ*.

١٣٧ - مضارب في يده الفان من مال المضاربة اشتري باحدهما دارا ثم اشتري بالاخر دارأ هو شفيعها بدار المضاربة و بدار له خاصة و رب المال شفيعها بدار له فلرب المال ثلثها بالشفعة و ثلثها للمضارب خاصة و ثلثها علي المضاربة فان كان هناك شفيع اخر فله ثلث الدار

137. A *muzārib* partner has 2000 *dirhams* in the partnership fund. He purchases a house for 1000 out of 2000, and thereafter he purchases another house for the remaining 1000 of which he were the pre-emptor by reason of a *muzārib* house as well as his own house, and the *rabul māl* partner also is its pre-emptor by reason of his own private house, then the *rabul māl* will be entitled to pre-empt ⅓ of it, and the *muzārib* also will pre-empt ⅓ and the remaining ⅓ would be added to *muzārib* partnership property (as if pre-empted by it), *i.e.*, the whole house under pre-emption will be divided equally among the *rabul māl*, *muzārib* and the partnership firm. And if there

و ثلثاها بين المضارب و رب المال والمضاربة اثلاثا كذا في محيط السرخسي -

were another pre-emptor then he will be entitled to take ⅓ and the rest ⅔ of the property will be divided equally among the *rabul māl muzārib* and the partnership firm. This is according to the *Muhīt* of *Sarakhsī*.

١٣٨ - و في الفتاوي العتابية لو طلب الشفيع الشفعة ثم اقر بداره لرجل فللمقر له الشفعة وكذا لو اخذ بداره دارا بيعت بجنبها بالشفعة ثم بيعت اخرى بجنب الماخوذة فاخذها ثم اخرى بجنبها بقضاء فاستحقت داره الاولى رد الماخوذة الاولى علي المشتري وبقيت الاخرى للاخذ فان استحقت احدي الدارين بطلت الشفعة الا اذا اجاز المستحق فحينئذ لم تبطل فان كان احد المشتريين شفيعا ايضا فللشفيع

138. It is stated in the *Fatāwa-i-'Itabiyya* that if the pre-emptor demands pre-emption, and thereafter admits the ownership of another person in the house by reason of which he demanded pre-emption, then the person in whose favour the admission is made will be entitled to pre-emption. Similarly if the pre-emptor pre-empts a house by reason of his house being adjoined to the house sold, then another house adjoining the house pre-empted is sold, and the pre-emptor pre-empted that house also, and thereafter he pre-empted a third house in the vicinity of the second pre-empted house by the decree of the Kazī, and subsequently his first house was reclaimed by some person on establishment of his right of ownership, then he may have to return to the purchaser the first house which he had pre-empted, but the other houses will be retained by him, and finally if either of these houses were reclaimed by some person on proof of his title, then pre-

الاخر نصف الدار بنصف قيمة الاخرى كذا في التاتار خانية - باع دارا من اجنبي فاخذه الشفيع فمرض البائع وهو مورث الشفيع وحط عن المشتري بطل الحط ولو ولاه المشترى من وارث البائع او رابح صح الحط ولم يلزم حط مثله عن الوارث كذا في الكافي - و لا تقبل شهادة الامر بالشراء ولا شهادة ابنه اذا كانت الدار في يد البائع ولو كانت في يد المشتري جازت شهادة ابن البائع و لو شهد اثنان على تسليم الشفيع و اثنان على تسليم المشتري تهاترا ولو شهدا الشفيع بالشراء فان طلب الشفعة بطلت

emption will be annulled, but if the claimant permits it will remain valid, and if either of the two purchasers happen to be pre-emptors also, then the other pre-emptor will be entitled to pre-empt half the house at half the value of the other house. This is according to the *Tātār Khāniyya.* A person sells a house to a stranger, and the pre-emptor demands pre-emption in it, thereafter the seller became ill, and he happens to be the person from whom the pre-emptor might inherit, and he remits a portion of the price to the purchaser (stranger), then such reduction will be invalid. If the purchaser (strang[illegible]) again sells the house to the [illegible]r at its cost price or at profit [illegible] it will be lawful and will th[illegible] effect the "heir pre-emptor" als[illegible] This is according to the *Kāfī.* The evidence of the person who authorises another person to purchase on hi[illegible]lf, and or the evidence of his son [illegible]ld not be accepted even thou[illegible] the house were in the possession of the seller; but if the house were in the possession of the purchaser, the evidence of the sons of the seller will be accepted, and if two persons depose that

شهادته وان سلم
جازت ولو قال
اجزناه فطلب جاز
و لو اقر انه باعها
من فلان وانكر
المشتري ثبتت
الشفعة ولو كان
المشتري غائبا لم
ياخذ حتي يحضر
ولو اقر ولم يبين
المشتري فلا شفعة
كذا في التاتار
خانية - واذا وكل
الذمي المسلم
بطلت الشفعة لم
تقبل شهادة ادن
الذمة علي الوكيل
المسلم
الشفعة لانهم
يشهدون على
المسلم بقول منه
وهو منكر لذلك
و شهادة اهل الذمة
لا تكون حجة علي
المسلم وان كان
الذمي هو الوكيل
و قد اجاز الشفيع
ما صنع الوكيل
قبلت شهادتهم
و بطلت الشفعة

the pre-emptor had relinquished his right of pre-emption or, the other two witnesses depose that the purchaser had transferred the house to the pre-emptor, then witnesses of both the parties will not be believed. If the pre-emptor produces evidence that the sale had taken place, and if he had already demanded pre-emption, the proof is useless, but if he had relinquished his right, the evidence tendered will be of use. If the pre-emptor says, "I have allowed purchase and also demanded pre-emption," the statement would be lawful. If a person admits that he sold the house to such and such person, but that person denies it, nevertheless the right of pre-emption will arise, but if the purchaser were absent, then the pre-emptor will not be entitled to pre-empt it, until he re-appears, and if the seller admits the sale but the purchaser has not named the purchaser then there will be no pre-emption. This is according to the *Tātār Khāniyya.* If a *Zimmī* appoints a Muslim as an agent to demand pre-emption, then if the *Zimmī* deposes to the effect that the agent has surrendered the right of pre-emption it will not be final

لان الوكيل لو
اقربذلك جازاقراره
فان الوكل اجاز
صنعه علي العموم
مطلقا فكذلك اذا
شهد بذلك عليه
اهل الذمة لان
شهادتهم علي الذمي
في اثبات كلامه
حجة كذا في
المبسوط ولو قال
البائع وهبة منه
وقال المشتري
اشترية بكذا فالقول
للبائع و رجع في
الهبة فان حضر
الشفيع و اخذها
بالثمن فلا شئي
له ولو اخذها باقرار
المشتري ثم حضر
البائع وانكر البيع
اخذها كذا في
التتا تار خانية-
اشتري المضارب دارا
و رب المال شفيعها
فسلم ثم باعها
المضارب لا شفعة
له لان المضارب باع
له و لا شفعة لمن
بيع له كذا في

against the Muslim agent, because the *Zimmī* here says that a relinquishment has been made by the agent, which the agent may deny, and the depositions of *Zimmīs* are not binding upon Muslims. But if the agent were also a *Zimmī*, and the pre-emptor had agreed that whatever the agent will do will be lawful, then the above deposition will be accepted, and the right of pre-emption will be annulled, because such act by the agent will be considered as lawful under the general authority of his principal. In short if the *Zimmī* deposes against a *Zimmī* agent, it will be accepted. This is according to the *Mabsūṭ*. If the seller says, "I have made a gift of the house to him," while the purchaser says, "I have purchased it for so much," the words of the seller will be accepted, and the seller will be entitled to revoke the gift; but if the pre-emptor appears and pre-empts it on payment of the price, then the seller will have no right to revoke the house. This is according to the *Tātār Khāniyya*. A *muẓārib* partner purchases a house and the *rabul māl* partner is its pre-emptor, and he relinquishes his right of pre-emption, thereafter the *muẓārib* partner sells it, now the *rabul māl*

partner will not be entitled to pre-empt it, because the *muzārib* has sold it in a sense on his (*rabul māl*) behalf also, in the capacity of a co-partner, and he who sells a house cannot pre-empt it. This is according to the *Muḥīt* of *Sarakhsi*. If the Kazī decrees pre-emption in favour of an agent, but the purchaser declines to execute the deed in his favour, then the Kazī will have the decree attested by two persons, just as he does when a purchaser refuses to deliver the house, and if necessary on application to him, as he does in all litigations with respect to all decree-holders, the Kazī will give to the pre-emptor a *sijl*, order, confirming pre-emption. This is according to the *Mabsūṭ*. It is stated in the *Yatimat*, that 'Ali Ibn Ahmad was consulted in case where a certain land was owned by some co-sharers, some of whom were absent, while others were present, and those who were present pre-empted the shares of those who were absent, here the point was whether *Shafi'-i-Jār* could pre-empt in the absence of the co-sharers. The answer was 'Yes,' but when the absent co-sharers will appear, they will be entitled to take back the property

محيط السرخسي -
و اذا قضي القاضي
للوكيل بالشفعة
فابي المشتري بان
يكتب له كتابا
كتب القاضي
بقضائه كتاباً واشهد
عليه الشهود كما انه
يقضي له بالشفعة
وان كان المشتري
ممتنعا من التسليم
والا تقيا و له
فكذلك يكتب له
حجة بقضائه و يشهد
علي ذلك نظرا له
واذا كان له في
سائر الخصومات
يعطي القاضي
المقضي له سجلا
اذا التمس ذلك
ليكون حجة له
فكذلك في القضاء
بالشفعة يعطيه ذلك
كذا في المبسوط -
و في اليتيمة
مسئل علي بن
احمد عمن اشترى
نصيبا معلوما من
ارض مشتركة بين
جماعة بعضهم
حضور و بعضهم
غيب اشترى نصيب
الغيب الحضور هل
لشفيع الجاران
ياخذ من المشتري

ما اشترى مع غيبة الشريك فقال نعم له ان ياخذ ذلك و ان حضر الشريك كان احق به من الجار كذا في التاتار خانية - ولو وهب رجلان من رجل دار على الف درهم و قبضا منه الالف مقسومة بينهما و سلما اليه الدار ذلك و للشفيع فيها الشفعة لانعدام الشيوع في الدار فالتملك فيها واحد و انعدام الشيوع في الالف حين قبض كل واحد منهما نصيبه مقسوما ولو كانت الالف غير مقسومة لم يجز في قول ابي حنيفة لان الشيوع فيما يحتمل القسمة يمنع صحة التعويض كما يمنع صحة الهبة والالف يحتمل القسمة كذا في المبسوط -

from the *Shafi'-i-Jār*. This is according to the *Tātār Khāniyya*. If two persons made a gift of a house with a condition of return for 1000 *dirhams* to a person, and each received an equal amount out of 1000 from him, and they delivered possession of the house to the donee, the pre-emptor will retain his right of pre-emption, because the house was in joint ownership, and was not a divided one, and 1000 *dirhams* also cannot be said to be two different sale considerations, because what each gave was his share of the whole. If 1000 are not deemed divisible, then according to Imām Abu Ḥanifa, the transaction would be unlawful, because what is incapable of division cannot be subject of exchange and Hiba, and here 1000 *dirhams* are obviously capable of division. This is according to the *Mabsūṭ*.

فتاوی قاضی خاں THE FATAWA-I-KAZI KHAN

بسم الله الرحمن الرحيم

In the name of the Allah the Beneficent, the Merciful.

(۱) الشفعة حق شرع نظرا لمن كان شريكا اوجارا عند البيع تثبت في العقار بالبيع وتتاكد بالطلب وتملك بالقضاء اوبالتسليم اما البيع الذي يثبت به الشفعة هو الجائز الذي يزيل ملك البائع

1. *Shuf'a* is a legal right which appertains, at the time of sale, to *shafi'-i-sharik* or *shdfi'-i-jar*. It is established in the *'aqar* (immoveable property) which is sold. It is strengthened by demand (*talab*), and the ownership of the property is acquired either by the decree of the Kazi or by the surrender (of the property by the vendor or vendee). It is established after a valid sale and after a cessation of the vendor's ownership in the subject of sale.

(۲) فان كان في البيع خيار فانكان الخيار المشتري كان فيه الشفعة وان كان الخيار للبائع اولهما جميعا فلا شفعة فيه مالم يسقط الخيار وخيار الرؤية والعيب لايمنع ثبوت الشفعة

2. If the sale is optional, and if the vendee has the option then pre-emption arises in it, whereas if the option belongs to the vendor or to the vendee and the vendor both, then in such a case, pre-emption does not arise, unless option expires. The option of inspection and defect does not prevent the establishment of the right of pre-emption.

(۳) ولا شفعة في البيع الفاسد وان اتصل به القبض الم يبطل حق البائع في الاسترداد -

3. There is no *shuf'a* in an invalid sale, though the property passes into the possession of the vendee, until the right of the vendor to take it back ceases.

(۴) ولا شفعة فيما يملك بغيربدل اوببدل ليس بمال نحوالميراث والهبة والنكاح والاجارة بان جعل

4. There is no *shuf'a* in a property acquired, without a return or with a return, which is not considered as '*mal*' property or by inheritance, or gift, or property

الدار اجرا او بدل الخلع
بان اختلعت المرأة
من زوجها على دار
ولا شفعة في عقار مالک
بالصلح عن القصاص
في النفس او فيما دون
النفس —

assigned in dower, or as a hire, that is a house let on hire, and a house assigned as a compensation for *khula*, that is, a house assigned by a woman to her husband in consideration of which he is to grant her a divorce. There is no *shuf'a* in '*aqar* (immoveable property) made over to compound an action for murder or a wound.*

(٥) ولو وهب دار
ابشرط العوض فالشفعة
فيها مالم يتقابضا فاذا تقا
بضا وجبت الشفعة فياخذ
الشفيع الدار بمثل
العوض ان كان العوض
مثليا وان لم يكن فبقيمة
وان كان الهبة بغير شرط
العوض ثم عوضه بعد الهبة
فلا شفعة فيها —

5. The right of *shuf'a* does not operate in a house assigned as a gift with a condition of return until the donor and donee have taken possession of the properties exchanged, and when they have taken possession of the properties the pre-emptor may pre-empt the house by making an equivalent return if it is a *shai-misli*,* otherwise he may pre-empt it by paying the value of the return. If a house is assigned as a gift without a condition of return, and then the donee makes a return for it, then there is no pre-emption in such a house.

(٦) ولو بيعت الدار
بثمن مؤجل ان اراد
الشفيع ان ياخذ الدار
في الحال بالثمن المؤ
جل لم يكن له ذلك ويكون
له الخيار ان شاء اخذها
بثمن حال وان شاء
ينتظر حلول الاجل فاذا
حل ياخذها بالثمن
الحال وان اراد الانتظار
الى حلول الاجل وقد كان

6. If the house is sold on credit, subject to deferred payment and if the pre-emptor desires to pre-empt it immediately, and pay the price when the time of payment arrives, he cannot do so; but he has this option that if he intends to take it immediately, he may pre-empt it at the fixed price, or he may wait till the period expires; and when the time arrives he may demand the house at the price fixed. But when he

*This part of Law may be taken to be obsolete in British India.

طلب طلب المواثبة فانه يطلب بطلب الاشهاد فان لم يطلب وانتظر حلول الاجل بطلت شفعة وكذا لو بيعت الدار على ان المشترى بالخيار ولم يطلب الشفيع طلب الاشهاد بطلت شفعة –

desires to await the arrival of the time, and he has made *talab-i-muwasabat*, immediate demand, then he should make *talab-i-'ishad*, demand with invocation. But if he did not make the demand with invocation, and awaited the expiry of the period, then his right of pre-emption becomes void, and similarly if the house was sold to the vendee with an option, and if the pre-emptor did not make *talab-i-'ishad*, his right to pre-empt is invalidated.

(٧) والمسلم والكافر والكبير والصغير والذكر والانثى فى الشفعة لهم وعليهم سواء وكذا العبد الماذون والمكاتب ومعتق البعض –

7. The right of pre-emption belongs equally to a Muslim, and a non-Muslim whether major or minor, male or female, and similarly, it belongs to a slave *mazun*,[1] or *mukatib*,[2] and to a slave who has been partly emancipated.

(٨) والخصم عن الصبيان فى الشفعة لهم وعليهم اباءهم واوصياء الاباء عند عدمهم والاجداد من قبل الاب عند عدمهم فان لم يكن الا فاوصياء الاجداد فان لم يكن فالامام والحاكم يقيم لهم من ينوب عنهم فى الخصومة والطلب –

8. The right of pre-emption, on behalf of the infants, belongs to their fathers or to the father's executors when they are dead, or to grandfathers when there are no executors, or to the executors of grandfathers when grandfathers are dead, or to the Imam when there are no such persons as mentioned above. The Kazi will appoint, on behalf of the Imam, persons, who would act as guardians to such children and would demand and claim *shuf'a*, on their behalf.

---

1 A slave permitted by his master to purchase and sell.

2 A slave who could purchase his freedom from his master at a stipulated sum.

(۹) فالشفعة على عدد الرؤس عند ناقلت الا نصباء اوكثرت —

9. The right of *shuf'a* (according to the *Hanafi* Law) is equally calculated *per capita*, though the shares of the several sharers happen to be small or great.

(۱۰) ومن باع دارا وهو شفيعها بدارله اخرى فلاشفعة له فيها باعها لنفسه اوكان وكيلا فى البيع اوقيما او وصيا —

10. If a person sells a house, and he seeks to pre-empt it by means of his house which adjoins to this house, then in this case, he has no right of pre-emption, whether he sold it himself or in the capacity of an agent of some person or as a guardian.

(۱۱) ولواشترى الاب دارالولده الصغير وهو شفيعها كان له ان ياخذها لنفسه عندنا ولو اشترى الوصى لليتيم دارالايملك اخذها لنفسه بالشفعة —

11. If a father purchases a house on behalf of his infant son, and if he himself has a right to pre-empt it then, according to our jurists he may pre-empt it for himself. If the guardian of an infant purchases a house in which he also has a right of pre-emption, then in this case, he cannot pre-empt it for himself.

(۱۲) ولواشترى الاب دارالنفسه وولده الصغير شفيعها ليس للصبى اذا بلغ ان ياخذها بالشفعة ولوباع الاب داره وولده الصغير شفيعها كان للصبى ان ياخذها بالشفعة اذا بلغ —

12. If a father purchases a house, in which his infant son has a right of pre-emption, then in this case the son cannot demand pre-emption, after he attains majority. If a father sells a house in which his infant son has a right of pre-emption, then the son has a right of demanding pre-emption when he attains majority.

(۱۳) ولوباع المضارب دارامن المضاربة ورب المال شفيعها لاشفعة له فيها ولو باع المضارب دار الغيرالمضاربة كان لرب

13. If the *muzarib*[1] sells a house from the partnership property, and if the *rub-ul-mal*[2] is its pre-emptor, then he (*rub-ul-mal*) has no right of pre-emption in that house. And if the *muzarib* sells

[1] A partner who supplies his personal labour in partnership.
[2] A partner who supplies his capital in the partnership.

المال ان یاخذها بالشفعة
بدار من المضاربة ويكون
له خاصة ولوباع رب المال
داراله خاصة والمضارب
شفيعها بدار من المضاربة
فان كان فيها ربح فله ان
ياخذها لنفسه بالشفعة
وان لم يكن فيها ربح فلا
ياخذ –

a house which does not belong to the partnership property, then the ***rub-ul-mal*** has a right of demanding pre-emption in it, by reason of the house which belongs to the partnership property. If the ***rub-ul-mal*** sells his own house, and if the ***muzarib*** is its pre-emptor by reason of the house which belongs to the partnership property, then, if it is profitable to demand ***shuf'a*** he can do so, otherwise he cannot demand pre-emption in it.

(۱۴) واذا بيعت الدار
بجنب دار مشتركة
بين رجلين كان لكل
واحد من الشريكين فيها
الشفعة وتسليم احدهما
الشفعة يصح فى حق
نفسه دون صاحبه –

14. If a house adjacent to the house which is a joint property of two co-sharers is sold, then each one of them has a right of pre-emption in it, and the surrender of the right by one of the co-sharers holds effective in his case alone and the right of the other co-sharer remains intact.

(۱۵) ولو باع الرجل
دارا وعبده المأذون
شفيعها فان كان على العبد
دين فله الشفعة وان لم
يكن فلا شفعة له ولو باع
العبد المأذون دارا و
المولى شفيعها فان لم
يكن على العبد دين
فلا شفعة للمولى وان
كان عليه دين فلمولاه
الشفعة فلو باع المولى
دارا ومكاتبه شفيعها كان
له الشفعة وان باع المكا
تب ومولاه شفيعها كان
له الشفعة ايضا –

15. If a man sells a house, and if his slave ***mazun*** is its pre-emptor, then if he (the slave) is in debt then he can demand ***shuf'a***, otherwise he cannot claim pre-emption. If a slave ***mazun*** sells a house, and if his master is the pre-emptor, then in case if the slave is in debt the master can demand ***shuf'a*** in it, otherwise he has no right of pre-emption in it. If the master sells a house, and if his slave ***mukatib*** is its pre-emptor, then he has a right to pre-empt it, likewise if the slave ***mukatib*** sells a house and if his master is the pre-emptor, then he also has a right to pre-empt it.

(١٦) ولومات الشفيع لايكون لورثته الشفعة وان مات البائع والمشترى والشفيع حى كان له الشفعة —

16. If the pre-emptor dies, then his heirs have no right of pre-emption. If the vendor or the vendee is dead and if the pre-emptor is alive, then his right of pre-emption remains instact.

فصل فى الطلب —

Chapter on the Demand of Shuf'a.

(١٧) طلب الشفعة ثلثة طلب المواثبة وطلب الاشهاد و طلب التملك —

17. The demands of pre-emption are of three kinds, ***talab-i-muwasabat*** immediate demand, ***talab-i-'ishad,*** demand with invocation, and ***talab-i-tamlik,*** demand of ownership.

(١٨) المطالب المواثبة فوقته فور علم الشفيع بالبيع —

18. By ***talab-i-muwasabat*** is meant, that when a person who is entitled to pre-emption is informed of a sale, he ought to claim his right immediately.

(١٩) ان اخبره بالبيع رجلان اورجل وامراتان او رجل عدل فسكت هينهة ولم يطالب الشفعة بطلت شفعة وان اخبره بالبيع رجل واحد غير عدل اوامرأة اوعبد اوصبى ولم يطالب الشفعة لا يبطل شفعته فى قول ابيحنيفة رح وفى قول صاحبيه رح بطل لان الشرط هوالطلب فورالعلم بالبيع وعندهما الاعلام يحصل بخبر الواحد عدلا كان اولم يكن حرا كان اوعبدا صبياً كان اوبالغا و عند ابيحنيفة رح يشترط العلم احدشرطى الشهادة وهوالعدد اوالعدالة وقد مرهذا فى البكر اذا

19. If the pre-emptor is informed of a sale by two men or one man or, two women, or one just person, and if he remains silent, and does not demand pre-emption immediately then the right of *shuf'a* becomes void. If an untrustworthy person or one woman, or a slave, or a boy informs him (the pre-emptor) of sale, and if he does not demand pre-emption at once, then Abu Hanifa maintains that his right to pre-empt is not invalidated; whereas according to the two disciples it is invalidated, because it is necessary to demand pre-emption as soon as the pre-emptor is informed of the sale, and according to them it is a complete information even though it is brought by a person whether he is just or untrustworthy, free-born or a slave, a minor or a major; while according to Imam Abu Hanifa there

زوجت واخبرت بالنكاح
وسكتت -

are two conditions relating to the information of sale, and one of them must be present in order to invalidate the pre-emptor's right to demand pre-emption. They are as follows:—If there is one person who informs him (the pre-emptor) of the sale, then it is necessary that he should be a just person, otherwise the condition of number is necessary. This difference of opinion has also been mentioned in the case of a virgin bride who when informed of marriage kept quite.

(۲۰) وروى هشام عن
محمد رح انه يشترط
الطلب فى مجلس العلم
فان طلب فى المجلس
صح وان قام عن مجلسه
قبل الطلب بطلت شفعة
وبه اخذ الكرخى رح
قال وهذا بمنزلة اختيار
المخيرة والامر باليد و
قبول البيع وذلك يبقى
الى ان يوجد الاعراض
وفى ظاهر الرواية
يشترط الطلب فور العلم -

20. Hisham relates from Imam Muhammad that it is necessary to demand pre-emption at the meeting or assembly where the pre-emptor receives the information of sale, and if he demands it at the end then it is sufficient, but if he leaves the meeting without demanding pre-emption, then his right is invalidated. Kurkhi maintains the same view, and says that this case is similar to the case of a woman being deligated the option of divorce, and it is also similar to the acceptance of sale, the right exists until it is negatived. According to the Zahir-ur-Riwayat, it is necessary to demand pre-emption as soon as the information of sale has been received.

(۲۱) واختلفوا فى لفظ
هذا الطلب قال بعضهم يقول
طلبت الشفعة واناطالبها
واطلبها وقال بعضهم يطلب
بلفظ الماضى اوالمستقبل

21. The jurists differ as to the particular words in which this demand, *i.e.*, immediate demand should be made. Some of them say that it should be made thus: "I have demanded pre-emption, I demand

ولايجمع بينهما وقال
بعضهم يقول اطلب الشفعة
اخذها ولا يقول طلبت
الشفعة واخذتها فان قال
ذلک بطلت شفعته لان
ذلک کذب محض وقال
بعضهم لايقول اطلب الشفعة
و اخذها لان ذلک عدة
قال وقوله طلبت الشفعة
واخذتها يذكر الحال
عرفا كقوله بعت
واشتريت -

it, and I shall demand it," and some say that demand should be made in words of past or future tense and that these two tenses should not be joined together ; and some maintain that the pre-emptor should say, "I shall demand or make pre-emption" and should not say, "I have demanded pre-emption, and have taken it," for if he says so, his right of ***shuf'a*** is invalidated, because to say like this amounts to falsehood. Some of them hold that the pre-emptor should not say: "I will demand or take *shuf'a*," because it amounts to a promise ; and they also maintain that his statement. "I demanded and made pre-emption" indicates present tense by *urf*, custom, like the statement of a vendor or vendee at sale "I sold or I bought" which is equivalent to "I sell, or I buy."

(۲۲) والصحيح انه
اذا طلب باى لفظ طلب
بالماضى اوالمستقبل
يصح طلب وهواختيار
ابى جعفر والفقيه ابى
الليث والشيخ الامام ابى
بکر محمد بن الفضل
رح وحکى عن الشيخ الامام
ابى بكر محمد بن
الفضل رح لو ان قر
وياقال شفعة شفعة كان
طالبا وكذا لو قال وشفعه
امراست بخواستم
ويافتم -

22. The correct opinion is that the pre-emptor is at liberty to make the demand in any way he likes, it does not matter whether the words indicate past tense, future or present tense. Imam Abu Jafar, jurists Abul Lais and Shaikh Imam Abu Bakr Muhammad Bin Fazal all of them hold the above view. It is related from Shaikh-ul Imam Abu Bakr Muhammad Bin Fazal that if the pre-emptor is a villager and if he calls out ***shuf'a, shuf'a***, then it will be lawfully considered that he has made the demand, and similarly if the pre-emptor says any words indicative of demanding ***shuf'a*** (***e.g.***, ***shuf'a*** is mine

I desire *shuf'a*, have pre-empted) he will be considered to have lawfully made the demand of pre-emption.

(۲۳) وقال بعضهم لو
قال الشفيع الشفعة لی
اطالبها وا اخذها بطلت
شفعة لان قوله لی لغو
لایحتاج الیه وعن بعض
المشائخ رح اذاقال
الشفيع للمشتری حين
لقيه انا شفيعك اخذ
منك الدار بالشفعة بطل
شفعة كما لو قال للمشتری
حين لقيه كيف اصبحت
اوكيف امسيت

23. Some jurists say that if the pre-emptor says, "The right of pre-emption belongs to me, I will demand and take *shuf'a*," then his right is invalidated on account of this absurd statement which was not required at all here. It is related from certain jurists that if the pre-emptor when he meets the vendee says, "I am the pre-emptor and I shall demand from you the house in pre-emption" then his right to pre-empt is invalidated, just as it is done when the pre-emptor meeting the vendee asks him, "How do you do, or How are you?"

(۲۴) وذكر الناطقی
رح اذا علم الشفيع بالبيع
فقال الحمدلله قد اد
عيت شفعتها اوقال
سبحان الله لاتبطل شفعة
وكذا لوقال للمشتری
حين لقيه السلام عليك
ورحمة الله وبركاته طالبت
الشفعة اوقال كيف
اصبحت اوكيف امسيت
اوقال الله اكبر اوعطس
صاحبه فشمته ثم طالب
الشفعة صح طلبه ولوسأله
شيأ من الحوائج ثم طالب
تبطل شفعة وقال
الناطقی رح على قياس
قول سبحان الله اوكيف
اصبحت اوكيف امسيت

24. Natiqi mentions that when the pre-emptor is informed of the sale, and he says, "God be praised, I demand pre-emption," or if he says, "Glory to God," his right to pre-empt is not invalidated and similarly if he says to the vendee, when he meets him, "Peace the mercy of Allah and his abundance be with you" and then says, "I demand pre-emption," or if he says, "How do you do," or if he says, "God is the Greatest," and when somebody sneezes, he replies ("God's" blessings be with thee), and thereafter demands pre-emption, then in all these cases his demand remains valid; whereas if he asks for something concerning his own needs first, and then

اذا قال المشترى حين
لقيه اوقال اطال الله
بقاءك ثم طلب الشفعة
لاتبطل شفعته وعن الشيخ
الامام ابى بكر محمد بن
الفضل رح رجل اشترى
دارا فلقيه شفيعها والمشترى
واقف مع ابنه فسلم
الشفيع على ابنه قبل ان
يطلب الشفعة تبطل شفعة
وان سلم على المشترى
لاتبطل شفعته قال لان
الشفيع محتاج الى
الكلام مع المشترى فكان
محتاجا الى السلام عليه
لان الكلام قبل السلام
مكروه ولو قال
الشفيع للمشترى شفعت
خواهم قالوا تبطل
شفعته كان هذا اللفظ
طلب الشفاعة لا طلب
الشفعة

demands pre-emption his right is invalidated. Natiqi with reference to the pre-emptor's statements: "Glory to God, how do you do, or how are you," to the vendee when he meets him or when he says to him, "God may prolong your life," and then demands pre-emption, applies Qiyas,[1] and is of opinion that in such cases the pre-emptor's right is not invalidated. It is related from Imam Abu Bakr Muhammad bin Fazal, that if a person buys a house, and if the pre-emptor meets him (the vendee) while he is standing with his son, and if the pre-emptor before demanding pre-emption says to the vendee's son, "Peace be with you," then his right is invalidated, while if he says to the vendee, "Peace be with you," then his right remains established, because the pre-emptor must talk with the vendee, and so he is obliged to say "Peace be with you," for conversation before wishing a person is undesirable. And if the pre-emptor says to the vendee, "I demand *shuf'aat*," then the jurists maintain that his right becomes void because the word *shuf'aat* is not the same as *shuf'a*.

(٢٥) رجلان ورثا عن
ابيهما اجمة واحد الوارثين

25. If two persons inherit a lake *Ajmat*, from their father, and one of them

[1] Qiyas is a process of deduction, it is an important source of the Muslim Law, and is recognised by the four Schools of Sunni Jurisprudence by the *Hanafi*, the *Shafi'*, the *Maliki* and by the *Hanbali*.

بعينه لم يعلم بالميراث
ولم يعلم بان له فيها
نصيبا فبيعت اجمة اخرى
بجنب هذه الاجمة فلم
يطلب هو الشفعة فلما علم
ان له فيها نصيبا فطالب
الشفعة في الاجمة المبيعة
قالو ابطال شفعته لان
شرط تاكد الشفعة طلب
المواثبة عند العلم بالبيع
فاذا لم يطلب والجهل ليس
بعذر لا يبقى له الشفعة -

does not know whether he has any share in it meanwhile another lake which is adjacent to this lake is sold, and this person does not demand pre-emption in the lake sold, then his right, is invalidated, because one of the conditions of *shuf'a* is that it should be demanded immediately after the information of the sale by the pre-emptor, and when he has not demanded, his ignorance of the fact cannot be pleaded as an excuse, and the right is extinguished.

(۲۶) شفيع ظن ان
مشتري الدار فلان فسكت
هو ابطال الشفعة فاذا علم
ان المشتري غير فلان كان
له الشفعة وقال بعضهم
اذا اوهم الشفيع ان
فلان فسكت ثم علم ان
المشتري غيره فطالب
لا يصح طلبه ولو
قيل للشفيع بيعت
دار كذا فقال من
اشتريها او قال بكم اشترا
ها فلما اخبر بذالک قال
طالبت الشفعة صح طلبه
وكذا الو قيل للشفيع بيعت
دار كذا بالف درهم فسكت
ثم علم انها بيعت بخمسمائة
درهم كان له الشفعة -

26. If the pre-emptor believes a particular person to be the vendee of the house sold, and he keeps quiet and does not demand pre-emption, but later on he learns that the vendee of the house is some other person than that of his former knowledge, then in this case he has a right to demand pre-emption. Whereas some jurists maintain that if the pre-emptor believes that a particular person is the vendee of the house sold, and so he does not demand pre-emption, but when he learns that the vendee is some other person and demands pre-emption, then he cannot maintain his claim. If the pre-emptor is informed that a particular house is sold, and he says, "who bought it or for how much did he buy it?" and after he is informed of all this says, "I demand pre-emption," then in this case his

demand is valid. And similarly when the pre-emptor was informed that a particular house was sold at *dirhams* [1] 1000 he kept quiet; but afterwards he learns that the house was sold at *dirhams* 500 and demands pre-emption, then in this case his right of pre-emption remains intact.

(٢٧) دار بيعت بجنب دار رجل والجار يزعم ان رقبة الدار المبيعة له ويخاف انه لو ادعى رقبتها تبطل شفعته لان مالك الدار لايكون شفيعا وان ادعى الشفعة لايمكنه دعوى الدار انها له ماذا يصنع حتى لايبطل شفعته قالوا يقول هذه الدار داري وانا ادعى رقبتها فان وصلت اليها والا فانا على شفعتي منها لان هذه الجملة كلام واحد فلم يتحقق السكوت عن طلب الشفعة -

27. If a house which is adjacent to that of *shafi'-i-jar* is sold, and he (*shafi'-i-jar*) doubts whether the house sold is his property, and is afraid that if he claims the house as his property, his right of pre-emption would be invalidated because the owner of the house cannot be its pre-emptor, and also that if he demands pre-emption, then he would be unable to claim ownership. What should he do in this case so that his right of pre-emption is not invalidated? The jurists hold that he should say, "This house is mine, and I am the claimant of the house as my property, if I succeed so much the better, otherwise, I demand pre-emption in it." As this is one complete and continuous expression no indifference (*sukut*), as to the claim of pre-emption can be inferred from the nature of such a demand.

(٢٨) صغيرة ادركت ثبت لها خيار البلوغ ،

28. A minor girl on attaining the age of puberty is entitled to the option of

[1] *Dirham* is a silver coin. According to Von Kremer it is roughly equivalent to the French franc.

والشفعة ان قالت طلبت
الشفعة و اخترت نفسى
اوقالت اخترت نفسى
وطلبت الشفعة صح الاول
وبطل الثانى فان قالت
طلبت حقين لى الشفعة
والخيار صح كلاهما —

puberty[1] and if also to the right of pre-emption, she says, "I demand pre-emption, and I exercise the option of puberty," or if she says, "I exercise the option and also demand pre-emption," then according to her former statement her right of pre-emption is established and by the latter it is invalidated; but if she says, "I have taken upon myself my two rights, *viz.*, my right of pre-emption and that of option," then her statement establishes both her rights.

(٢٩) اذا سمع الشفيع
بيع الدار فسكت قالوا
لا يبطل شفعته مالم يعلم
المشتري الثمن كالبكر اذا
استومرت فسكتت ثم
علمت ان الاب زوجها
من فلان فردت صح ردها
رجل اشترى دارا وقال
للشفيع اشتريتها لنفسى
فسلم الشفيع الشفعة او
سكت ثم ظهر انه اشتراها
لغيره قال محمد رح
بطل شفعته وقال ابو
حنيفة رح لا تبطل وعليه
الفتوى —

29. If the pre-emptor is informed of the sale and he kept quiet, the jurists say that until he learns as to who, is the vendee and what is the price his right to pre-empt is not invalidated, similar to the case of a virgin who when consulted about her marriage contract, kept quiet, and afterwards she learns that the particular bridegroom is so and so and if she now rejects the proposal then it is lawful. If a person purchases a house and says to the pre-emptor, "I have purchased the house for myself," and if then the pre-emptor surrenders his right or keeps quiet, but afterwards learns that the vendee had purchased the house for some other person, then according to Imam Muhammad, the pre-emptor is not

[1] Also known as "the option of repudiation," the right vested in a minor (male or female) to satisfy or rescind on attaining puberty the marriage contracted on his or her behalf during minority.

entitled to pre-emption; whereas Imam Abu Hanifa maintains that his right to pre-empt is not invalidated. The fatwa is on this latter view.

(۳۰) رجل صلی الظهر ثم شرع فی الرکعتین بعد الفرض فاخبر بالبیع فجعلها اربعا روی هشام عن محمد رح انه لاتبطل شفعته ولو جعلها ستا بطلت شفعته ولوکان فی الاربع قبل الظهر فاخبر بالبیع فاتمها اربعا لاتبطل شفعته و ذکر الناطقی رح اذا علم بالبیع وهو فی التطوع فجعلها اربعا اوستا لاتبطل شفعته والصحیح انه اذا جعلها اربعا لاتبطل ولوجعلها ستا تبطل ولو افتتح الاربع بعد الجمعة لاتبطل شفعته وان صلی اکثر من اربع بطلت شفعته وکذا لو افتتح الرکعتین بعد الظهر لاتبطل شفعته ولو افتتح التطوع بعد طلب المواثبة

30. If a person is offering his noon-prayers, and during two *rak'ats* after *farz*,[1] he is informed of the sale, and then instead of offering two *rak'ats*, he offers four, then Hisham relates from Imam Muhammad that his right is not invalidated, but if he offers six *rak'ats*, the right is invalidated. If he receives the information during the four *rak'ats* of *sunnat* before the *farz* of *zuhr*, and if he finishes it, his right remains intact. Natiqi says that if the pre-emptor receives the information of sale while he is offering *tatawa'* and if he offers four or six *rak'ats* of it, his right of pre-emption is not invalidated. The correct view is that if the pre-emptor offeres four *rak'ats*, his right remains good, but if he offers six, his right is invalidated. And if he began to offer four *rak'ats* after *Juma,'* Friday

[1] The Muslim service consists of two parts, the *farz*, compulsory prayer and the *sunnat*, the prayers according to the traditions of the Prophet. The *farz* prayers are as follows :—

The *farir* morning prayer 2 *rak'ats*, the *zuhr* early afternoon prayers 4 *rak'ats*, the *'Asr* late afternoon prayers 4 *rak'ats*, the *Maghrib* the evening prayer just at sunset 3 *rak'ats*, and the *'Isha* early night prayer 4 *rak'ats*. The *sunnat* prayers are said along with the *farz*. The *nafil* or *tatawa'* prayers are not obligatory.

قبل طلب الاشهاد تبطل شفعته —

prayers, then also his right remains valid, but if he offered more than four, he loses his right to pre-empt, and similarly if he began two *rak'ats* after the *farz* of *zuhr*, he retains his right of pre-emption; if the pre-emptor begins *tatawwa'* after *talab-i-muwasabat*, but before making *talab-i-'ishhad*, then his right is invalidated.[1]

(٣١) وبعد ما طلب الشفيع طلب المواثبة فور علمه بالبيع يحتاج الى طلب الاشهاد وانما يسمى الثاني طلب الاشهاد ولان الشهادة شرط بل لتمكنه اثبات الطلب عند جحود الخصم —

31. The pre-emptor after receiving the information of sale, and having made *talab-i-muwasabat* is required make *talab-i-'ishhad*, it is called *talab-i-'ishhad*, not because evidence is necessary but to enable the pre-emptor to establish his claim in Court.

(٣٢) فان كان الشفيع حاضرا في مجلس البيع فطلب الشفعة بحضرة البائع او المشتري كفاه ذلك عن الطلب الثاني وان لم يكن كذلك فذهب الي البائع او الي الدار لطلب الاشهاد فالمسئلة علي وجوه —

32. If the pre-emptor was present at the time of sale, and he demands pre-emption in the presence of the vendor and the vendee, then these circumstances suffice to establish *talab-i-'ishhad*; but if the pre-emptor was not present at the place of sale, then he should make *talab-i-'ishhad*, before the vendor, or at the premises and this problem has various aspects.

(٣٣) ان كان البائع و المشتري والشفيع والدار في مصر واحد

33. If the vendor, the vendee, the pre-emptor and the house, are all in the same town, and if the house is

[1] This appears to be a very strict application of the rule. *Talab-i 'ishhad* should be made with the least practicable delay and it is submitted that the Court must decide in each case whether due diligence has been used to avoid unnecessary delay.

والدار في يد البائع فالی يهم ذهب الشفيع و طلب الشفعة صح طلبه؛ ولايعتبر فيه الاقرب ولاالا بعد لان المصر مع تباعد الاطراف كمكان واحد الا ان يختار على الاقرب و لم يطلب الشفعة فحينئذ تبطل شفعة وانكان البائع و المشتري و الدار في مصر واحد والشفيع في بلدة اخري فالي ايهم ذهب الشفيع الى البائع والدار في يد البائع او الي المشتري او الى الدار و طلب الشفعة صح طلبه - و انكان الشفيع في موضع الدار والبائع والمشتري في السواد اوكان الشفيع مع احد المتبايعين في مصر واحد واحد المتبايعين والدار في غير المصر فقصد الشفيع الا بعد لطلب الشفعة وترك الا قرب اليه بطلت شفعة -

in possession of the vendor, then the pre-emptor has an option to go to any one of the above three places and make *talab-i-'ishhad* there. In this case it will not be considered whether the pre-emptor went to the nearest or to the farthest, because a town, in spite of several places within its precinct being distant from one another, is considered to be a single locality, but if the pre-emptor passed by the nearest place and did not demand pre-emption then his right is annulled. If the vendor, the vendee, and the the house are in the same town, and if the pre-emptor happens to be in some different town, then it does not matter whether the pre-emptor goes to the vendor while the house is in his possession, or to the vendee, or to the house, and makes his demand there; the right is established no matter where he demanded it. If the pre-emptor is in the same town where the house is, and if the vendor and the vendee are not in the same town, or if the pre-emptor is with one of them in the same town and the house is in some other town then in this case if the pre-emptor visits the farthest place to make the demand and neglects the nearest, then his right of pre-emption is annulled.

(۳۴) وانكان البائع سلم الدار الى المشترى فان طلب الشفيع من

34. If the vendor has transferred the house to the vendee, and the pre-emptor demands pre-emption from

المشتري واشهد صح طلب وكذا لو لم يكن الدار في يد المشتري و طلب الشفيع من المشتري صح طلب - وان طالب من البائع واشهد انكان الدار في يد البائع صح طلبه والالا ويصير كانه لم يطلب وصورة طلب الاشهاد ان يقول الشفيع للمشتري حين لقيه طلبت منك الشفعة في دار اشتريتها من فلان التي احد حدودها كذا و الثاني كذا والثالث كذا والرابع كذا وانا شفيعها بالجوار بدار احد حدودها كذا والثاني كذا والثالث كذا والرابع كذا فسلمها الي ولابد ان يبين انه شفيع بالشركة اوبالجوار اوفي الحقوق و يبين الحدود لتصير الدار معلومة

the vendee, and invokes witnesses on it, then his demand is lawful, and the same holds good if the pre-emptor makes his demand to the vendee even though he (the vendee) is not in possession of the house. If the pre-emptor demands pre-emption from the vendor while the house is in his possession, and invokes witnesses on it, then his demand is established; whereas if the house is not in his possession, the demand is void. The way in which *talab-i-'ishhad* should be made is this: The pre-emptor should say to the vendee when he meets him, "I demand pre-emption from you in the house which you have purchased from such and such person, and whose boundaries are these" (here he should mention its boundaries,) "and I am its pre-emptor by reason of the neighbourhood of my house whose boundaries are," these (then after stating them, he should say to the vendee) "deliver it to me." It is necessary to mention whether the pre-emptor demands pre-emption by reason of his being a partner or a neighbour and the pre-emptor should describe the boundaries of the house so that everything should be clear and evident.

(٣٦) اذا اخبر الشفيع بالبيع في جوف الليل فلم يقدر على ان يخرج للاشهاد فان اشهد حين اصبح صح طلبه لانه اخر الا

36. If the pre-emptor receives the information of sale at midnight so that it is not possible for him to go out and invoke witnesses then, and consequently he makes *talab-i-'ishhad* after the sun rises, then his demand is valid, because

شهاد بعذر واليهود اذا اخبر بالبيع يوم السبت فلم يطلب الشفعة بطلت شفعته لانه غير معذور في التاخير وكذا لو كان الشفيع في عسكر اهل الخوارج او اهل البغي فخاف على نفسه ان يدخل في عسكر اهل العدل فلم يطلب بطلت شفعته لانه غير معذور

his delay in this case is excusable. If a Jew[1] received information of sale on Saturday, and did not demand pre-emption, his right of pre-emption is invalidated, because it is not permissible for him to delay; and similarly if the pre-emptor was in the camp of the ***ahl-ul-khwarij***, dissenters, or in the camp of the ***ahl-ul-baghi***, the mutineers, and feared to enter, the camp of ***ahl-ul-adl***, the just party, and so did not demand pre-emption, then his right of pre-emption is invalidated, because he is not excused.

(٣٧) ولو كانت الشفعة بالجوار وخاف الشفيع انه لو طلب الشفعة بالجوار عند قاض لا يرى الشفعة بالجوار يبطل شفعته فلم يطلب كان على شفعته

37. If it is a case of ***shufa'-bil-jawar*** demanding pre-emption by reason of neighbourhood, and the pre-emptor is afraid of losing his right by demanding pre-emption before a Kazi who with regard to *shuf'a-bil-jawar* does not pass decrees,[2] then in this case if he did not demand pre-emption his right of pre-emption is not invalidated.

(٣٨) ولو علم الشفيع بالبيع وهو في طريق مكة فطلب طلب المواثبة ولم يقدر على طلب الاشهاد فان لم يكن البائع والمشتري في الرفقة فانه يوكل وكيلا ليطلب الشفعة فان لم

38. If the pre-emptor is informed of sale while *en route* to Mecca and he has made *talab-i-muwasabat*, but is unable to make *talab-i-'ishhad* then in this case, if the vendor and the vendee are not his (the pre-emptor's) companions of voyage, he must appoint an agent to demand pre-emption, but if he did not appoint an agent,

---

[1] However under the Anglo-Muhammadan Law, it seems a delay over a Sunday by a non-Muslim is not fatal—Wilson, Digest p. 396.

[2] It appears that the Kazi does not administer the ***Hanafi*** Law, *e.g.*, he may be a ***Shafi'i***.

يوكل ومضى فى الطريق
فان وجد من يوكله
بالطلب ولم يوكل تبطل
شفعته وان لم يجد وكيلا
ووجد فتى يكتب كتابا
على يديه ويوكل
بالكتاب وكيلا فان لم يفعل
بطلت شفعته وان
لم يجد وكيلا ولا فتى لا
تبطل شفعته حتى يجد
لانه معذور

and pursued his journey then this case has two aspects: (*a*) If the pre-emptor met a person whom he could appoint as his agent, but did not appoint him, then his right of pre-emption is invalidated, (*b*) and if he did not find an agent, and met a person (scribe[1] *fata*) then he should have a letter written by him appointing an agent by means of the letter, but if he did not act in this manner, then his right of pre-emption is invalidated. However if the pre-emptor found neither the agent nor a person then his right of pre-emption is not annulled; until he met one of them he is excused.

(٣٩) دار بيعت ولها
شفيعان احدهما حاضر
فطلب الحاضر الشفعة
وقضى له القاضى ثم حضر
الشفيع الاخر فان الشفيع
الثانى يطلب الشفعة
من الشفيع الذى
قضى له القاضى لان الذى
قضى له القاضى قام
مقام المشترى هذا
اذا طلب الاول جميع
الدار بالشفعة فلو انه طلب
النصف الدار ظنا منه
انه لايستحق النصف
بطلت شفعته وكذا
لو كانا حاضرين فطلب

39. If a house is sold, and there are two pre-emptors and one of them is present and he demands pre-emption, and the Kazi decrees pre-emption to him, and thereafter the other pre-emptor appears, then this (the second) pre-emptor should demand pre-emption from the first pre-emptor whom the Kazi decreed pre-emption, because he (the first pre-emptor) in this case stands in the position of the vendee. This should be done when the first pre-emptor had demanded pre-emption in the whole of the house, but if he had demanded pre-emption in the half of it only, thinking that he is not entitled

1 It seems that this illustration contemplates the case of an illiterate pre-emptor.

to more than half, then his right of pre-emption is invalidated; and similarly if both the pre-emptors were present, and each one of them claimed pre-emption in the half of the house, then the rights of both of them are invalidated, because abstinence from claiming pre-emption in the remaining half of the house amounts to surrender of the right in that half, and if the right of pre-emption is invalidated in one-half of the house, it is invalidated in the whole of it. The same is mentioned in the book. Natiqi mentions that when a person purchases a house in the neighbourhood of the pre-emptor, and if the pre-emptor goes to the vendee, and asks him (the vendee) to deliver half of it to him in pre-emption, and the vendee refuses, then in this case the right of pre-emption is not annulled: this is the correct view,[1] because to demand a half of the house in pre-emption does not amount to the surrender of the right of pre-emption in the other remaining half, and similarly if the pre-emptor says to the vendee, "I am the pre-emptor and so deliver to me half of the house, in pre-emption, and I shall in return surrender the remaining half to you," the vendee may refuse the offer but the right of the pre-emptor is not invalidated.

كل واحد منهما الشفعة
فى نصف الدار بطلت
شفعتهما لان السكوت
عن النصف الباقى تسليم
الشفعة فى النصف
السكوت يبطل شفعته
فى النصف يبطل فى الكل
كذا ذكر فى الكتاب
وذكر الناطفى رح
رجل اذا اشترى
دارا فى جنب الشفيع
فجاء الشفيع وقال سلم
الى نصفها بالشفعة فابى
المشترى لا يبطل شفعته
وهو الصحيح لان طلب
تسليم النصف لا يكون
تسليما للباقى وكذا لو
قال الشفيع انا شفيع
فخذ الدار فسلم الى نصفها
بالشفعة فاسلم لك
النصف الباقى فابى
المشترى لا يبطل شفعته

[1] The Fatwa-i-Alamgiri is also of the same opinion but the Indian High Courts have preferred the former view (*vide* sec. 18, ante p. 19.)

(٤١) الوكيل بشراء
الدار اذا اشترى و قبض
فجاء الشفيع و طلب
الشفعة من الوكيل قبل
ان يسلم الوكيل الدار الى
الموكل قال الشيخ الامام
ابوبكر محمد بن الفضل
رح يصح طلبه و ان كان
ذلک بعد ماسلم الوكيل
الدار الى الموكل لايصح
طلبه و لو ان الشفيع سلم
الشفعة الوكيل صح تسليمه
سوء كانت الدار فى يده
اولم يكن الوكيل طالب
الشفعة اذ سلم الشفعة
المشترى جاز عند ابيحنيفة
و ابي يوسف رح وهو
بمنزلة تسليم الاب و الجد
شفعة الصغير

41. When the agent purchases a house, and has taken possession of it, and then the pre-emptor goes to the agent and makes his demand to the agent before he (the agent) has handed over the house to the principal, then, Shaikh Imam Abu Bakr Muhammad Bin Fazal says that the pre-emptor's demand is valid, whereas if it is made after the agent transferred possession of the house to the principal, the demand is invalid. And if the pre-emptor surrenders his right of pre-emption for the agent, then his surrender is valid, irrespective of the fact whether the house is in the agent's possession or not. When a person, who is appointed as the agent to demand pre-emption, surrenders the right of pre-emption for the vendee, then his (the agent's) surrender of the right is valid according to Imam Abu Hanifa and Imam Muhammad, just as the surrender of the right of pre-emption by the father or the grandfather, in behalf of the minor is deemed valid.

(٤٢) رجل له شفعة
عند القاضى فانه يتقدم
القاضى الى السلطان
و ان كانت شفعته عند
السلطان و امتنع القاضى
عن احضاره كان الشفيع
على شفعته لانه ترک
الطلب بعذر

42. If a person demands pre-emption from the Kazi, then he should take the Kazi before the Sultan, and if he demands pre-emption from the Sultan and the Kazi is unable to summon the Sultan, then in this case the right of pre-emption remains because the "putting off" of the claim is excusable.

(٤٣) رجل اشترى
لابنه الصغير دارا

43. If the father purchases a house for his minor son, and he himself

والاب شفيعها كان للاب ان
يأخذها بالشفعة كان
الاب لو اشترى مال
ولده الصغير لنفسه
جاز واذا اراد ان يأخذ و
يطالب يقول اشتريت
واخذت بالشفعة فتصير
الدار له ولا يحتاج الى
القضاء و لو كان مكان
الاب وصيا فالجواب فيه
كالجواب في شراء الو
صي مال اليتيم لنفسه
على قول من يملك
ذلك يكون الوصي بمنزلة
الاب و على قول
من لا يملك ذلك فله
الشفعة ايضا لكن يقول
اشتريت و طلبت الشفعة
ثم يرفع الامر الى القاضي
حتى ينصب القاضي
وصيا عن الصبي فيأخذ
الوصي منه بالشفعة
ويسلم الوصي الثمن الى
اليتيم ثم بعد ذلك يسلم
اليتيم الى الوصي

is the pre-emptor of the house, then the father has a right to demand pre-emption in it, because it is lawful for a father to purchase for himself the property of his minor son. And when the father intends to purchase or pre-empt it, then he should express himself thus: "I purchase it or I pre-empt it," and in this way the house becomes his property and there is no necessity to confirm the act by having recourse to the Kazi's decree. And in the case of a father's executor, the same principle applies as it does when the guardian desires to purchase a ward's property for himself. The jurists who allow pre-emption to the executor they do so, because they consider him in the position of the father. And those who do not allow him the right of purchasing the ward's property for himself, also allow him the right of pre-emption; and the guardian should say, "I purchase it or I demand pre-emption," but he must place the matter before the Kazi and the Kazi will appoint a guardian, curator, on behalf of the minor from whom the executor should pre-empt and pay the price, and thereafter the curator will entrust the price to the executor.

(٤٤) الشفيع بالجوار
اذا باع الدار التي
يستحق بها الشفعة الا
شقصا منها لا تبطل شفعته

44. When a neighbour sells a house by reason of which he could demand pre-emption, but retains a portion of it, then his right of pre-emption is not

لان مابقی یکفی الشفعة
ابتداء فیکفی ابقائها —
الشفیع اذا باع الشفعة
بعد ماوجبت له
الشفعة لانسان او وهبها
لانبطال شفعة لان حق
الشفعة لایحتمل التملیک
بلفظ الهبة و البیع لانها لم
تصادف محلها —

invalidated, because what remains of the house in his ownership is sufficient to give rise to the claim for *shuf'a* and to establish it. If the pre-emptor sells his right of pre-emption, after it has merely accrued, to a person or has gifted it away then his right of pre-emption is not invalidated, because by the sale of the right, or by gift, no title has passed for pre-emption itself was incomplete.

(۴۵) الشفیع اذا ادعی
رقبة الدار المشفوعة انها
له لابالشفعة تبطل
شفعة وان طالب الشفعة
ثم ادعی رقبة الدار
المشفوعة انها له لایسمع
دعواه لان طلب الشفعة
اولا اقرار منه بعدم
الملک فلا یسمع دعواه

45. When the pre-emptor sues for the ownership of the house, subject of pre-emption, and does not claim pre-emption in it, then his right of pre-emption is annulled, but if he first demands pre-emption and thereafter sues for ownership then his suit for ownership will not be decreed, because his first demand is an admission of the fact that the house is not his own property and so his claim is inadmissible.

(۴۶) ولو تصرف المشتری
فی الارض المشفوعة قبل
ان یاخذها الشفیع بان
وهبها من انسان وسلم
اوتصدق بها او اجرها
اوجعلها مسجدا اوصلی
فیها اوجعلها مقبرة و دفن
فیها او وقفها وقفا مستدلة
لاتبطل شفعة الشفیع وله ان
ینقض تصرف المشتری
وان باعها المشتری من
غیره کان الشفیع بالخیار
ان شاء اخذها بالبیع
الاول وان شاء اخذها

46. And if the vendee has made any alteration in the house, subject of pre-emption, before the pre-emptor has demanded it, or if the vendee has gifted the house to some person and also has handed over the possession to him, or has given it in charity, *sadqah* or has rented it, or has made it a *masjid* in which people offer prayers, or has made it a grave-yard, in which people are buried, or has made a *waqf* endowed it, then in all these cases the right of the pre-emptor is not annulled, and he has the right to nullify

بالبيع الثاني واوغرس
المشتري فيها كرما
اوشجرا اوبني فيها بناء
اوغرس رطبة كان للشفيع
ان يقلع ويا خذ الارض
بالشفعة وان زرع
المشتري فيها زرعا في
القياس له ان يقلع
ويا خذ الارض بالشفعة
كما في الشجر وفي
الاستحسان يتوقف الى
ان يستحصد الزرع ثم
يا خذ بالشفعة—ولو اشترى
الرجل دارا و زخرفها
بالنقوش بشئ كثير
كان الشفيع بالخيار ان شاء
اخذ و اعطاه ما زاد وان
شاء ترك —

these transactions of the veudee. Meanwhile if the vendee has sold the house to a third person then the pre-emptor has an option of pre-empting (the house) by the first sale, or if he chooses by the second sale. If the vendee has planted vines in the land subject to pre-emption, or if he has planted any other kind of trees, or if he has erected a building on it, or if he has grown vegetables on it, then the pre-emptor has a right to destroy all these things and pre-empt the land only; and if the vendee has cultivate l the land, then according to the doctrine of *Qiyas* he has a right to destroy the cultivation, and pre-empt the land just in the same way as the pre-emptor can destroy the trees and pre-empt the land, whereas according to the doctrine of *Istehsan*,[1] the pre-emptor must wait until the crops are gathered, and then take the land in pre-emption. If a person has purchased a house and has spent a large sum on its ***naqush*** decoration (drawing engraving and painting) then the pre-emptor, if he chooses, can take it on payment of the price *plus* the additional sum which the vendee has spent on such decoration, or he may give up the claim.

(۷۳) وان حطه
البائع شيئا من الثمن
كان للشفيع ان ياخذ

47. If the vendor has reduced the price in favour of the vendee, then the pre-emptor has the right to buy the house

[1] *Istehsan* is equivalent to the modern notion of Equity, and it is recognised by the Hanafi School of jurisprudence only.

بما ورآه المحطوط واوزاد
المشتري البائع في الثمن
كان للشفيع ان ياخذها
بدون الزيادة –

at the reduced price; and if the vendee has increased the price for the vendor, then the pre-emptor has a right to buy the house, at the (original) price, without the increase.

(٤٨) ولوتقايل البائع
والمشتري لاتبطل الشفعة
وكذلك لوانفسخ البيع
بينهما بخيار شرط
اورؤية اوالرد بالعيب
بعد القبض بقضاء
القاضي ولوكانت الشفعة
بالجوار فباع الشفيع
داره التي يستحق
بها الشفعة بطلت
شفعته

48. If the vendor and the vendee mutually consent to rescind the sale then the pre-emptor's right to demand pre-emption is not annulled and similarly when the property has passed into the possession of the vendee, the right is not extinguished, though thereafter the sale is cancelled, on account of the option of condition, inspection or defect by the order of the Kazi. And if a neighbour has sold his house by reason of which he is entitled to demand pre-emption then his right of pre-emption is invalidated.

(٤٩) ولو اجر الرجل
داره مدة معلومة ثم باعها
قبل مضي المدة والمستا
جر شفيعها قال ابونصر رح
يجوز البيع بين
البائع والمشتري ولايقدر
البائع على تسليم
الدار الابرضا المستاجر
واجازته فان طلب
المستاجر الشفعة كان
طلبه اجازة للبيع فيبطل
الاجارة وله الشفعة
هو بخلاف ما اذا باع الدار
وضمن الشفيع الدرك
للمشتري اوضمن الثمن
للبائع فانه لايكون له الشفعة

49. If an owner of a house has rented it for a definite term and sells it, before the term expires, and if the tenant happens to be the pre-emptor also then according to Abu Nasar, the sale between the vendor and vendee is valid, but the vendor is not entitled to transfer the possession of the house to the vendee until the tenant consents and permits; and if the tenant demands pre-emption, then his demand amounts to his acknowledging the sale, and thereby his tenancy is extinguished, and his right of pre-emption is established; contrary to the case where a person sells a house, and if the pre-emptor

لان ثمه تعلق جواز
البيع بضمانه فصار
الشفيع بمنزلة البائع
فلايكون له الشفعة اما
ههنا بيع المستاجر جائز
قبل اجازة المستاجر
فلاتبطل شفعته باجازته –

binds himself as a surety of ***dark*** (any defect creeping in the property in the future) to the vendee, or binds himself as a surety of the price to the vendor, then he has no right to demand pre-emption, because the validity of sale obviously rests on the surety-ship and hence he assumes a position like that of a vendor who has no right of pre-emption, but in this case the tenant has a right of pre-emption because the sale of house without his (the tenant's) permission is valid, hence his right to pre-empt cannot be extinguished even if he permits the sale.

(٥٠) واذا طلب
الشفيع طلب المواثبة
والاشهاد وابى المشترى
ان يسلم اليه الدار
فانه يرفع الامر الى
القاضى ويطلب منه
التمليك ولايملكها الشفيع
الابقضاء اورضاء حتى
لوبيعت دار اخرى
بجنب الدار المشفوعة
ثم قضى القاضى للشفيع
بالشفعة ثم دفعها اليه
لايكون لهذا الشفيع ان
ياخذ الدار الثانية
بالشفعة لان الشفيع
لم يكن جارالدارالثانية
قبل قضاء القاضى
وكذالوجعل الشفيع
داره التى يستحق بها

50. When the pre-emptor has made ***talab-i-muwasabat***, and also ***talab-i-'ishhad***, and the vendee refuses to hand over the house to him, then he must file the suit efore the Kazi, and demand the property from the Court. The pre-emptor cannot acquire the house except by the decree of the Kazi or by the mutual consent of the parties, so much so that if another house, which is adjacent to the house, subject of pre-emption, is sold, and subsequently the Kazi decrees pre-emption to the pre-emptor and delivers the house to him, still the pre-emptor cannot demand pre-emption in the second house sold because the pre-emptor was not ***shafi'-i-jar*** to that house before the decree of the Kazi was made in his favour. And

الشفعة مسجدا اووقفها
وقفا مستحلا اوجعلها
مقبرة ثم قضى له بالشفعة
ثانية لايكون شفيعا
الدار الثانية لان
قيام الملك له فيما
يستحق به الشفعة شرط
وقت القضاء والمسجد
والوقف المستحل يخرج
له الزائل عن ملكه —

similarly if the pre-emptor that is *shafi'-i-jar* has turned into a *masjid* his own house by reason of which he was entitled to pre-emption, or has made a lawful *waqf* endowment, or has turned it into a graveyard, thereafter the Kazi decrees pre-emption to him in the first house then the pre-emptor has no right to demand pre-emption in the second house sold, because continuance of the ownership of the house by reason of which he demands pre-emption is a necessary condition at the time of the decree, and since the house was turned into a *masjid* or *waqf*, the ownership became extinct and so the right also was extinguished.

(٥١) ولوان الشفيع
بعد طلب المواثبة
والاشهاد لم يرفع الامر
الى القاضي ان لم يمكن
من المرافعة لمرض
اوحبس اومنع مانع
ولم يجد من يوكل
بالخصومة لاتبطل
شفعة وان لم يكن
يرفع مع التمكن من
المرافعة ذكر في الكتاب
انها على شفعة ابدا
وان طال الزمان
قالوا هذا قول ابيحنيفة
رح اختلفت الروايات
عن محمد رح في
رواية اذامضى شهر
ولم يرفع مع التمكن
بطلت شفعة وفي

51. And if the pre-emptor, after making *talab-i-muwasabat* and *talab-i-'ishhad*, did not file the suit in the Kazi's Court then if he did not litigate on account of sickness, or imprisonment, or some reason by which he could not appoint an agent to litigate on his behalf, then his right of pre-emption is not annulled; but if he did not make the demand though he could, then it is related in the book, that his right of pre-emption continues for ever, no matter whatever length of time passes, and the jurists say this view is also held by Imam Abu Hanifa but reports from Imam Muhammad differ. According to one narration if a month passes and the pre-emptor does not demand though he

رواية اذا مضى شهر وثلثة ايام وفى رواية اذا مضت ثلثة ايام ولم يرفع بطلت شفعته واختلفت الروايات فيه عن ابى يوسف رح ايضا والفتوى على انه مقدر بشهر

could, then this right of pre-emption is invalidated, and according to another narration a month and three days and according to a report if only three days pass away without the pre-emptor's making the demand his right is invalidated, and reports from Imam Abu Yusuf also differ. The *fatwa* is on the period of one month.

(٥٢) واذا رفع الامر الى القاضى فان القاضى لا يسمع دعواه الا بحضرة الخصم فان كانت الدار فى يد البائع يشترط لسماع الدعوى حضرة البائع والمشترى لان الشفيع يطلب القضاء بالملك واليد جميعا والملك للمشترى واليد للبائع فيشترط حضورهما وان كانت الدار فى يد المشترى كفاه حضرة المشترى وان احضر الخصم وجاء اوان الدعوى يقول ان هذا اشترى دارا بكذا وانا شفيعها و يقول له القاضى اين الدار التى تريد شفعتها بين لى موضعها وحدود فان القاضى لا يتمكن من القضاء الا بمعلوم والدار اذا لم تكن بحضرتهما لا تصير معلومة الا ببيان الحدود فاذا بين الحدود يقول له القاضى باى

52. When the claim has been brought before the Kazi, he cannot hear the claim except in the presence of the other party; and if the property is in the possession of the vendor, then it is necessary to hear the claim before the vendor and vendee because the pre-emptor demands a decree for both the ownership and possession and consequently the presence of both the vendee and the vendor is necessary, but if the vendee is in possession of the property then his presence only suffices. When the time of claim comes, that is on the date of hearing the parties appear before the Court the pre-emptor-plaintiff should say, "This person that is the defendant has purchased a house at such and such price, and I am its pre-emptor," and the Kazi should say to him, "where is the house which you intend to demand in pre-emption? describe for me its situation and boundaries," for the Kazi cannot decree pre-emption unless

اسباب نطالب الشفعة لان اسباب الشفعة مختلفة بعضها مقدم على البعض فلابد من بيان السبب —

informed of the whereabouts of the house, and as the house is not before the Court it cannot be sufficiently described unless its boundaries are mentioned. After the pre-emptor has described its boundaries the Kazi should ask him the ground on which he demands pre-emption, because the grounds of demanding pre-emption differ and superior claim is preferred and consequently they ought to be mentioned.

فصل فى ترتيب الشفعاء (۵۳) قال فى الكتاب الخليط وهو الشريك فى نفس البقعة احق من الشريك اراد بالشريك هو الشريك فى حقوق الدار و الشريك احق من الجار والجار احق من غيره وصورة هذا الترتيب منزل بين رجلين فى دار مشترك بين احد هذين الرجلين وبين رجل اخر سواهما وهذه الدار فى سكة غير نافذة و على ظهر هذا المنزل دار لرجل اخر باب تلك الدار فى سكة اخرى فباع احد الشريكين المنزل فى الدار نصيبه من المنزل كان الشريك

Chapter on the Classes of Pre-emptors.

53. It is mentioned in the book that *shafi-i-sharik** the partner in the substance of a thing is preferred to ***shafi-i-khalit**** a partner in its rights, and that *shafi-i-khalit* is preferred to ***shafi'-i-jar**** and that *shafi'-i-jar* to strangers. To demonstrate this arrangement, take the case of an apartment in a mansion, which is shared by two partners and that one of them is a sharer with some third person in the mansion, and this mansion is situate in a street which is not a thorough-fare and that behind this apartment there is another mansion which belongs to a certain person, and its door opens into another street. If one of the partners sells his share then the other partner in the apartment is preferred to all others because he is a partner in the substance of the property sold, and if this partner

* According to the Arabic this terminology is incorrect,

فی المنزل اولی بالشفعة
من غیره لانه شریک
فی نفس البقعة
المبیعة فان سلمه
الشفعة کان الشریک
فی الدار اولی بالشفعة
من الشرکاء فی السکة
لانه شریک فی الطریق
الخاص وهو الطریق فی الد
ار فان سلمه فاهل السکة
احق بالشفعة لانهم شرکاء
فی الطریق فان سلموا انتقل
السکة کانت الشفعة الجار
الملاصق وهو الذی علی
ظهر المنزل

in the apartment surrenders his right, then the partner in the mansion is preferred to all the rest who are sharers in the street, because he is a partner in ***tariq-i-khas***, which leads to this mansion and if he, the partner in the mansion, surrenders his right then all persons who live in the street, that is *tariq* are preferred to others, and if they surrender their rights, then the right of pre-emption appertains to *jar-i mulasiq*, that is, the neighbour behind the mansion whose door opens into another street.

(۵۴) ولا شفعة فی
الوقف المتولی ولا
الموقوف علیه -

54. There is no pre-emption in endowments, ***waqf***, neither the ***mutawalli*** nor the beneficiary is entitled to the right of pre-emption.

(۵۵) ولا شفعة فی بیع
الکردار وهی التی
تکون فی الارض علی
نهر الدولة لان الکردار
نقلی ولا شفعة فی
المنقولات ولا شفعة فی
الاراضی التی حازها
الامام لبیت المال و
کذا الاراضی المیان
دیهة وهی التی
یزرعها الاکرة لا یجوز بیعها
ولا شفعة فیما کبس المزارع
منها التراب ویجوز بیعه

55. There is no pre-emption[1] in the case of sale of the agricultural ***kirdar*** lands, that is, lands situated on the site of a State canal because these are treated as ***manqulat***, moveables, and in which there is no pre-emption. There is no pre-emption in those agricultural lands which are set aside by the State for the public treasury, ***bait-ul-mal***, and similarly in the agricultural lands situated in the villages ***almian-dihiyat***, for it is not allowed to sell them. There is no pre-emption in the agricultural lands

[1] This section mentions technical nomenclature for some special agricultural lands and may be taken to be obsolete in British India.

القفار اذاكان معموما و لاشفعة فيها لما ذكرنا

which have been filled up by *turab*, mud and sand. However the sale of *kirdar* lands is lawful, but as explained above, the sale does not give rise to pre-emption.

(٥٦) رجل اوصى بغلة دار لرجل وبرقبتها لاخر فبيعت دار بجنب هذه الدار كانت الشفعة للموصى له بالرقبة

56. A person made a will *wasiyat*, to the effect that the income of the house should be given to a particular person, and he bequeathed the house itself to some other person. If in this case some property adjoining this house is sold, then the right of pre-emption belongs to the person to whom the house was bequeathed.

(٥٧) رجل اخذ ارضا مزارعة وزرع فيها فلما صار الزرع بقلا اشترى المزارع الارض مع نصيب رب الارض من الزرع ثم جاء الشفيع فله الشفعة في الارض وفي نصف الزرع الا انه لاياخذ بالشفعة حتى يدرك الزرع لان نصف الارض مشغول بنصيب المزارع

57. A person took an agricultural land and cultivated it, and when the crops ripened he purchased the land together with the share of the landlord in the crops of the field, after this if the pre-emptor comes then he can pre-empt the land and half of the cultivation, but he cannot demand pre-emption until the crops are ripened, because the other half of the land's cultivation is the share of the cultivator.

(٥٨) دار فيها ثلث بيوت بيت في اول الدار ثم البيت الثاني بجنب هذا البيت ثم البيت الثالث بجنب الثاني كل بيت لرجل احد باع واحد منهم بيته ان كان طريق البيوت في الدار كانت الشفعة للباقين بحكم

58. There is an enclosure in which there are three houses, standing on one side, the second by the side of the first and the third by the side of the second, and these houses have individual owners. Now if one of them sells his house and if a common passage to these houses passes through the enclosure, then the two other owners have a right of pre-emption by reason

الشركة في الطريق
وانكان ابواب البيوت
في سكة واحدة نافذة
لافي الد ارفان بيع
البيت الاوسط فالشفعة
لصاحب الاعلى والاسفل
فهما سواء لانهما جاران
متلازقان احدهما على
اليمين والاخر على
اليسار و ان بيع البيت
الاعلى كانت الشفعة
لصاحب الاوسط لاغير
لانه جار وان بيع البيت
الاسفل كانت الشفعة
لصاحب الاوسط لانه جار
ملازق —

of partnership in the way, and if the doors of the houses lead into an open street, and not into the enclosure then if the middle house is sold, the right of pre-emption belongs equally to the owners of the houses on the left and the right of it, because they are *jar-mulaziqs* (one of them on the left and the other on the right), and if the house on the left is sold, then the right of pre-emption belongs only to the owner of the middle house, and the same if the house on the right is sold, because he is a *jar-i-mulaziq* to both.

(٥٩) سكة غير نافذة
فيها سكة اخرى غير
نافذة بيعت في السكة
السفلى دار كانت الشفعة
لاهل السكة السفلى
لان لهم شركة في الطريق
الخاص وهي السكة
السفلى ولو بيعت في
السكة العليا دار كانت
الشفعة لاصحاب السكتين
جميعا لاستوائهم في
الشركة في الطريق —
وكذلك نهر خاص شق منه
نهرا آخر فبيع ارض على
النهر الصغرى كانت
الشفعة لاصحاب النهر
الصغرى ولو بيع ارض على
النهر الاول كانت الشفعة
لاصحاب النهرين جميعا ـ

59. Suppose there is a blindstreet in which another blind road meets, and that a house is sold in the street then the right of pre-emption will belong to the sharers of the street because they are partners in *tariq-i-khas*, and if a house is sold on the road, then the right of pre-emption belongs to the sharers both of the street and road, because they are equal partners in the *tariq*, way. Similar is the case of *nahr-i-khas*, a private canal, from which another small canal branches off. If a land is sold on this small canal, then pre-emption belongs to the users of this small canal only, and if a land is sold on the former canal, the right of pre-emption is equally vested in the users of both the canals.

(٦٠) دار بيعت ولها
بابان فی سکتین فان کانت
هذه الدار فی القدیم
دارین باب احدهما
فی سکة غیر نافذة وباب
الاخری فی السکة الاخری
مثلها فاشتراها رجل
ورفع الحائط بین الدارین
حتی صارتا دارا واحدة
فلاهل کل سکة ان یاخذ
الجانب الذی کان بابه
فی تلک السکة وان کانت
هذه الدار المبیعة فی
الاصل واحدة ولها بابان
کانت الشفعة لاهل
السکتین فی جمیع
الدار بالسویة انما یعتبر
فی هذه القدیم دون
الحادث وکذلک سکة
غیر نافذة رفع حائطها الی
الطریق الاعظم حتی
صارت نافذة بیع فیها دار
کانت الشفعة لاهل السکة
بالسویة لان هذه السکة
وان جعلت نافذة لم تکن
نافذة فی القدیم ولهم
ان یسدوا الطریق وکذ
لک حین رفع الحائط
لو قالوا جعلناها طریقا
للعامة لان لهم ان یسد
وا ویجعلوها کما کانت -

60. If there is a mansion which has two doors and each of which opens into a different street, then if this mansion was originally two separate houses, each having its door in a different street and a certain person purchased them, and removed the separating wall so as to unite the houses and make them one, then in this case inhabitants of each street have the right of pre-emption to that house whose door opens into their own street. And if this mansion was originally one single house and that it had two doors, then the people of each street have equal rights to demand pre-emption in the whole of the house. In short, the important fact is to ascertain the original condition of the house and not its present condition. And similarly in the case of a private street if its wall which separates it from the public road is removed so that it has now become a continuous thoroughfare. If a house is sold in the street the right of pre-emption appertains to persons living in the street though this street has been made continuous with the public road yet it was originally a private street but they can again separate the street if they desire, and the same principle applies when they remove the separating wall and declare it to be a public road, because they have a right to close the street.

(٦١) سكة في اقصا
ها دار طريق هذه الدار
في سكة نافذة بيع هذه
الدار فان كان طريق
الدار طريقا للعامة وليس
لاهل السكة ان يمنعو
هم فلا شفعة لاهل السكة
انما الشفعة تكون لجار
الدار وان كان طريق
هذه الدار خاصة
ولاهل السكة ان يمنعوا
العامة عن الدخول في
سككهم كانت الشفعة
لاهل السكة وكذ
لك سائر السكك ان كانت
في الخطة النافذة
لا شفعة لهم فان احدثوا
النفاذ لهم الشفعة
سكة غير نافذة
اقصاها مسجد وطرف
من اطراف المسجد
الى الطريق الاعظم فهي
سكة نافذة وان كانت
جوانب المسجد كلها
بيوت الناس كانت
الشفعة لاهل السكة
وهذا اذا كان المسجد
خطة فان لم يكن خطة
وانما احدثه اهل
السكة وجب لهم الشفعة
وكذلك حكم السكك
التي في اقصاها الوادي
بعد ما انهى سكة نافذة
لانهم يتخذون الى
الوادي والوادي بمنزلة

61. At the end of a street there is a house and its way opens into another private street. This house is sold. In this case if the passage to the house is a public way, and the people living in the street are unable to prohibit it from being used as a public way then they have no right to pre-empt the house, and the right of pre-emption belongs to the neighbour of the house. But if the passage to the house is a private way, and the people have a right to prevent the road from being used publicly, then the right of pre-emption is vested in them only. Similarly in the case of all streets leading into thoroughfares, the people have no right of pre-emption, but if they had joined a private street to a thoroughfare, they retain the right of pre-emption. If there is a private street at the end of which there is a *masjid* and on one side of the *masjid* there is a thoroughfare, then this street would be considered as a public street. If on all sides of *masjid* there are houses, then the right of pre-emption belongs to the people living in the street, provided it is a public *masjid*, and if it is not a public *masjid* that is constructed by the people living in the street, then the right of pre-emption belongs to the owners of the houses around the *masjid*. And the same principle is to be applied to the streets of

الطريق

Bukhara leading towards *vadis* (suburbs). The *vadis* will be considered as if public roads.

(٦٢) علو لرجل وسفل لاخرو طريق العلو فی السكة العليالافی السفلی باع صاحب السفل سفله كان لصاحب العلو ان یاخذ السفل بالشفعة لان السفل متصل بالعلو فكانا جارین ولو انه طلب الشفعة فانهدم العلو قبل ان یاخذ اوكان العلو منهدما حین بیع السفل كان لصاحب العلو یاخذ السفل بالشفعة فی قول محمد رح لان له حق التعلی علی العلو فیاخذ بذلک وقال ابو یوسف رح اذا انهدم العلو لاشفعة له - وصاحب السفل بشفعة العلو احق من الجار فی قول ابیحنیفة رح اذالم یكن للجار شركة فی الطریق -

62. The is a two-storied house, the upper story belongs to one person and the lower belongs to another person. The way of the upper story opens into a public way and not into the lower story. If the owner of the lower story sells it, then the owner of the upper story has a right to pre-empt the lower one, because the lower one is connected with the upper story, therefore its owners are neighbours to one another. If the owner of the upper story demands pre-emption, and before he takes possession of it, the upper house falls, or if it had fallen down, when the lower story was sold, then in these cases according to Imam Muhammad the owner of the upper story can pre-empt the lower one, because he has the right to build the upper story; whereas according to Imam Abu Yusuf, since the upper story is not in existence, its owner has no right of pre-emption. According to Imam Abu Hanifa, the owner of the lower story has a superior right of demanding pre-emption in the upper story to a neighbour who is not a partner in the way.

(٦٣) والشركة بالخشبة التی تكون علی حائط الغیر وله حق وضع الخشبة لاغیر یكون

63. If a person has only the right of putting the beams on the wall of his neighbour, then he is not a partner and is a neighbour only.

جارا ولايكون شريكا — سكة مستطيلة غير نافذة ينشعب منها زائغة مستطيلة غير نافذة بيعت دار من الزائغة كانت الشفعة لاهل الزائغة لشركتهم في طريق خاص — وان بيعت دار من السكة العليا كانت الشفعة لاهل السكة والزائغة جميعا لاستوائهم في المرور في السكة العليا —

(٦٤) وكذلك نهر لقوم ينشعب منه ساقية لقوم باع رجل من اهل الساقية ارضا شربها من الساقية كانت الشفعة لاهل الساقية — وان بيع ارض على النهر الاول كانت الشفعة لاهل النهر والساقية جميعا قراح في وسطه ساقية جارية شرب القراح من الساقية من الجانبين فبيع القراح فجاء شفيعان لهذا القراح احدهما على يمين الساقية والاخر على شمال الساقية كانت الشفعة لهما جميعا لان الساقية من القراح كانت من اجزاء

If there is a long private street from which a broad turning branches out and if a house on the turning is sold, then the right of pre-emption belongs to the inhabitants of the turning on account of their being partners in the way *tariq-i-khas*. In the above example, if a house is sold in the street then the right of pre-emption belongs to the people living in the street and the turning alike on account of their having equal rights of using the street.

64. Similarly if there is a canal which belongs to a particular tribe, and if from this canal there branches out another small canal which is owned by another tribe, then in this case if one of the users of the small canal sells his land which was watered by this canal, then the right of pre-emption belongs to the users of the small canal. In the above example if the land is sold on the big canal then the right of pre-emption belongs to the users of both of the canals. If there is a canal flowing through the middle of a *qarah*[1] and it waters both sides of the *qarah*, and if this *qarah* is sold, and there are two neighbours who are pre-emptors, one demanding pre-emption from the left side and the other from the right of the canal then in this case

[1] A garden, or an agricultural land.

the right of pre-emption belongs to them equally, because the canal passes through the *qarah*, and it is a part of it, and hence both of them are its neighbours.

القراح فكل واحد منهما يكون جار القراح

65. If a person has an enclosure in which there are several apartments and if he sells one of the apartments or a definite and particular part of the enclosure and if there is a neighbour to this enclosure on either side then the right of pre-emption is vested in him though he is not a neighbour to this particular part or the apartment sold. The right of pre-emption belongs to the neighbour of the enclosure because the part or the apartment sold is part of the enclosure and so he is a neighbour of the property sold. But if there is a pre-emptor and he surrenders his right and the vendee sells the apartment, then the neighbour of the enclosure is not entitled to pre-emption unless he is a neighbour of that particular part or apartment sold, because after it has been sold, it cannot be part of the enclosure. And similarly, if a person buys a house from amongst the houses in the enclosure, and if the whole enclosure belongs to a single person, then the neighbour to the enclosure is entitled to pre-empt the house though he does not happen to be the neighbour to the house, and if there is a pre-emptor and he surrenders his right, and the vendee sells the house, then

(٦٥) رجل له دار فيها مقاصير باع منها مقصورة معينة او طائفة معلومة وللدار جار على جانب واحد منها كان لجار الدار الشفعة وان لم يكن جار المقصورة ولا جار الطائفة لان المبيع من جملة الدار فكان جار الدار جار المبيع وان كان الشفيع سلم شفعته ثم ان المشتري باع تلك المقصورة لم يكن لجار الدار شفعة في المقصورة اذا لم يكن هو جار تلك المقصورة لان المقصورة بعد بيعها لم تبق من اجزاء الدار وكذلك الرجل اذا اشترى بيتا من دار والدار كلها لرجل واحد كان لجار الدار شفعة في البيت وان لم يكن هو جار ذلك البيت فلو ان الشفيع سلم الشفعة ثم باع مشتري البيت ذلك البيت لم يكن لجار الدار شفعة في البيت -

the neighbour to the enclosure is not entitled to pre-empt the house sold.

66. If a person buys a house in a blind lane, and then again buys another house in the same lane, then the inhabitants of the lane are entitled only to pre-empt the house which he bought first, because the vendee was not its pre-emptor at the time of its purchase but he was pre-emptor to the second house along with the people living in the lane, because at the time of sale of the second house, he had become one of the inhabitants of the lane. Similarly in a case of a house which is a joint property of three partners, another person buys a share of one of the partners then if the remaining two partners surrender their right to pre-empt the one-third share, the neighbour of the house has a right to pre-empt it; but if the vendee had purchased the rest of the property also the said neighbour has no right to pre-empt the remaining two-thirds, because when the vendee bought these shares, he had become a partner in the house, and so he is preferred to the neighbour. If there are four partners in a house, and a person buys the shares of three partners one after another, while the fourth partner is absent, and afterwards he presents himself, then he is entitled only to pre-empt the share of the first transaction and as regards the remaining two shares

(٦٦) ولوان رجلا
اشتري دارا في سكة
غير نافذة ثم اشتري
دارا اخري في تلك
السكة كان لاهل السكة
ان يا خذو الدار الا
ولى بالشفعة لان
المشتري لم يكن
شفيعا وقت الشراء
الاول ثم صار هو شفيعا
مع اهل السكة في
الدار لان المشتري
وقت شراء الدار
الثانية هو من اهل
السكة وكذلك دار
بين ثلثة نفر اشتري
رجل نصيب احد
ثم فالجار الدار ان
ياخذ الثلث ال ول اذا
لم يا خذ الشريكان
ذلك الثلث ثم لاشفعة
له في الثلثين الا
اخرين لان المشتري
شريك في الدار وقت
شراء الثلث الثاني
والثالث فيكون هو
مقدما على الجار •
ولو كانت لاربعة
نفر فاشتري رجل
نصيب الثلاثة واحد
ابعد واحد و الشريك
الرابع غائب ثم حضر
فله ان يا خذ نصيب

الاول وهو في نصيب الاخرين شفيع مع المشتري ولو اشتري احد الاربعة نصيب الاثنين واحدابعد و احد ثم حضر الرابع كان شفيعا مع المشتري في النصيبين جميعا لان في هذه الصورة كان المشتري شريكا وقت شراء النصيبين جميعا ·

he is a pre-emptor along with the vendee. If one of the four partners buys the shares of two of the partners one after another, and afterwards the fourth partner presents himself, then he is entitled to pre-empt the two shares along with the vendee for in this case the vendee was a partner at the time of purchasing the two shares.

(٦٧) رجل له خمس منازل في سكة غير نافذة فباع هذه المنازل فطلب الشفيع الشفعة في منزل واحد منها ان طلب الشفعة بحق الشركة في الطريق لم يكن له ان ياخذ البعض لما فيه من تفريق الصفقة من غير ضرورة وان طلب الشفعة بالجوار وجواره الي هذا المنزل لاغير كان له ذلك لانه جار لهذا الواحد خاصة و جنس هذه المسئلة يا تي بعد هذا في فصل على حدة · رجل له خان فيه مسجد افرزه صاحب الخان و اذن الناس بالتاذين وصلوة الجماعة فيه ففعلوا حتى صار مسجدا ثم باع صاحب الخان كل

67. A person has five houses in a blind lane, he sells these houses; and if the pre-emptor demands pre-emption in only one of the houses, then this case has two aspects. (*a*) If he demands pre-emption by reason of partnership in the way, then he cannot do so, because there would occur division of property without a necessity for it; (*b*) but if he demands pre-emption by reason of neighbourhood to the house sold, then he can demand pre-emption because he is a neighbour to a single house. An illustration to this problem will be given in another chapter. An owner of a certain inn, built a *masjid* therein and he allowed, calls for prayers, and *jama'at* prayers to be offered in it. The people did so and it turned into a proper *masjid*. Then the owner of the inn sold the apartments of the inn to different persons, and it turned into an inhabitation. In this case if an apartment is sold, then according to Imam

حجرة في الخان من رجل حتى صار دارا ثم بيع منها حجرة قال محمد رح الشفعة لجميعهم لاشتراكهم في طريق الخان وقد كان الطريق مملوكا.

Muhammad, all these inhabitants have a right to pre-empt the property sold on account of their partnership in the way of the inn.

(٦٨) دار بيعت وابا شفيعان بالجوار فطالبا الشفعة من المشتري ، ورفع احدهما المشتري الي حاكم لايري الشفعة بالجوار فقال له الحاكم لا شفعة لك ثم عزل الحاكم عن القضاء وولي آخر يري الشفعة بالجوار فجاء الشفيع الآخر فقضي هذا القاضي الثاني بالشفعة لم يكن للاول ان يشاركه في الشفعة لان القاضي الاول قد ابطل شفعته.

68. If a house is sold, and if there are two pre-emptors who claim pre-emption by reason of neighbourhood, and they demanded pre emption from the vendee, and one of them summoned the vendee before the Kazi[1] who does not decree *shuf'a* in such cases and the Kazi refused pre-emption to him, later on this Kazi retires from office and is succeeded by another Kazi who decrees pre-emption in such cases,[2] and now the other pre-emptor comes to this Kazi who decrees pre-emption in his favour, then the first pre-emptor is not entitled to participate in demanding pre-emption, because the first Kazi has invalidated his right of pre-emption.

(٦٩) رجلان اشتريا دارا احدهما شفيعها فالشفعة للشفيع فيما صار للاجنبي لان شراء الاجنبي لا يتم الا بقبول الشفيع البيع لنفسه

69. If two persons together buy a house and one of them happens to be its pre-emptor then he is not entitled to pre-empt the share of the stranger, because the ownership of the stranger does not become complete unless the pre-emptor accepts the sale for himself.

---

[1] He belongs to the *Shafi'* sect.

[2] He belongs to the *Hanafi* sect.

(٧٠) نهر فيه شرب لقوم وارض النهر لغيرهم فباع رجل ارضه والماء منقطع في النهر فلهم الشفعة في قول محمد رح • وفي قياس قول ابي حنيفة رح لاشفعة لهم بحق الشرب اذا كان الماء منقطعا كما في العلو اذا انهدم

70. The water of a canal is used by certain persons, and the bed of the canal belongs to another set of persons, then if one of the latter sells his land at the time when the canal is dried up, then according to Imam Muhammad, the users of the canal are entitled to pre-empt it, and there is a saying of Imam Abu Hanifa according to the doctrine of *qias* that they have no right of pre-emption as the water of the canal is dried up, just as the right of the owner of the upper storey when it falls down to pre-empt the lower ceases.

(٧١) رجل باع دارا و ابنه الصغير شفيعها ليس للوالد ان يطالب الشفعة لولده لانه بائع والصغير على شفعة اذا بلغ •

71. If a person sells his house, and his infant son is its pre-emptor, then the father is not entitled to demand pre-emption on behalf of his son, because he is himself the vendor, but the infant will be entitled to demand pre-emption when he attains puberty (majority).

(٧٢) اذا ثبت ان الشفعة تثبت باسباب وبعضها اقدم من البعض فاذا طلب الشفيع القضاء بالشفعة لابد من بيان السبب حتي يعلم القاضي انه باي سبب يقضي فان بين المدعي السبب وقال بدار لي يلازق المبيع تم دعواه ويطالب المدعي عليه بالجواب فان قال المدعي

72. It is stated that the right of pre-emption appertains on account of certain causes, and that some are preferred to others, hence when the pre-emptor demands a decree of pre-emption, he must state the cause so that the Kazi may know the reason, on which the claim is based, and if the plaintiff has stated the cause and has said that he demands pre-emption by reason of his house which is adjacent to the house sold, then his claim is complete, and the defendant

عليه مالك قبلي شفعة جوابا تاما ثم يقول للمدعي قد انكر ما ادعيت فان قال المدعي حلفه لي حلفه القاضي ثم قال في الكتاب يحلفه بالله ماهذا المدعي قبلك شفعة في هذه الدار التي ادعاها المدعي فان حلف انقطعت الخصومة بينهما الا ان يقيم المدعي البينة علي ما ادعى وان نكل المدعي عليه لزمته الشفعة ·

will be asked to answer it, and if he demurs that the plaintiff has no right of pre-emption against him, then this answer is complete, and the Kazi would convey the denial to the plaintiff. If the plaintiff requests the Kazi to take an oath from the defendant, then he should do so. It is stated in the book, that the oath should be taken thus: the Kazi should ask the defendant to swear to the effect that he (the plaintiff) has no superior right of pre-emption against him in the house in which he claims pre-emption, and if he swears to this effect, then litigation between them ends, but if the plaintiff produces proof of his claim, and the defendant refuses to swear, then the right of pre-emption is established in favour of the plaintiff.

(٧٣) وان قال المدعي عليه في الجواب اني قد اشتريت هذه الدار التي بين المدعي حدودها الا ان الدار التي في يد المدعى ويطلب بها الشفعة ليست له كلف المدعى اقامة البينة علي ان تلك الدار التي في يديه له فان اقام البينة علي الملك يستحق بها الشفعة وان لم يكن له بينة علي الملك

73. And if the defendant in answer to the plaintiff's suit says that he (the defendant) has purchased the house himself of which the plaintiff has described the boundaries, but that the house in his (the plaintiff's) possession, by reason of which he claims pre-emption does not belong to him, then in this case the plaintiff would be asked to produce proof on the fact that the house in his possession belongs to him, and if he then gives evidence as to his ownership of it, then he is entitled to pre-emption by reason of it, and if he has no evidence

ولكن قال ان المشتري يعلم انها لي حلف المدعي عليه بالله ما نعلم ان الدار التي في يد المدعي بجنب الدار التي اشتراها له فان حلف لاسبيل له عليه الا ان يقيم المدعي البينة على الملك وان نكل لزمته الشفعة .

as to his ownership of it, but if he says that the vendee knows that the house belongs to him, then the defendant should be sworn on oath to the effect that he does not know that the house in plaintiff's possession, and which is by the side of the house purchased, is the plaintiff's property; if he swears to this effect then the plaintiff has no alternative except to produce proof of hif ownership of the house, but if refuses to swear, then the right of pre-emption is established for the plaintiff.

(٧٣) وان قال المشتري اني قد اشتريت هذه الدار التي يريد ان يا خذها بالشفعة منذ سنة وقد علم هذا المدعي بشرائي ولم يطلب الشفعة يقول القاضي للمدعي متى اشترى هو هذه الدار فان قال المدعي طلبت الشفعة حين علمت كان صحيحا وكفاه ذلك فان قال المشتري ماطلبت حين علمت كان القول قول الشفيع وان قال الشفيع علمت منذ سنة وطلبت وقال المشتري لم تطلب كان القول قول المشتري وهو كالبكر اذا زوجت

74. If the vendee says that he purchased the house, against which the plaintiff demands pre-emption, a year ago, and that the plaintiff knew about the fact of purchase and still he did not demand pre-emption in it, then in this case, the Kazi should ask the plaintiff as to when he (the vendee) purchased the house, and if the plaintiff says that he (the plaintiff) demanded pre-emption as soon as he knew of the sale, then this statement suffices to establish his claim, and if the vendoe says that he did not demand pre-emption as soon as he received the information of sale, then still the statement of the pre-emptor would be relied upon. But if the pre-emptor says that he was informed of the sale a year hence, and that he had demanded pre-emption, and upon this the vendee says that he did not demand it, then the

فبلغها الخبر فردت فاختصما الى القاضى فقال الزوج حين بلغها الخبر سكتت وقالت رددت حين علمت كان القول قولها وان قالت علمت يوم كذا ورددت لايقبل قولها .

statement of the vendee is trustworthy, and this view is similar to the case of a virgin who, when she received the information of her marriage, rescinded it, and they (husband and wife) brought a suit before the Kazi. The husband alleged that when the woman received the information, she kept quiet, while the wife said that when she received the information she rescinded it, then in this case the statement of the wife is trustworthy, but if she said that she came to know about the marriage contract on such and such day, and then she rescinded it, in this case her statement is not trustworthy.

(٧٥) ولوقال الشفيع لم اعلم بالشراء الا الساعة كان القول قوله وعلى المشتري البينة انه علم قبل ذلك ولم يطالب ولوقال المشتري انه لم يطالب الشفعة حتي لقيني وقال الشفيع طلبت كان القول قول المشتري ويحلف بالله انه لم يطالب الشفعة حين لقيك ولوقيل للشفيع متى علمت فقال امس اوفى يومى قبل هذه الساعة لايقبل قوله الا ببينة .

75. And if the pre-emptor says that he knew of the sale just now, then his statement is relied upon unless the vendee produces evidence to the effect that he knew of the sale long before it, and that he did not demand pre-emption. And if the vendee says that the pre-emptor did not demand pre-emption when he met him and if then the pre-emptor says that he did demand, then the statement of the vendee will be trusted if he should swear that the pre-emptor did not demand pre-emption when he met the vendee. If the pre-emptor is asked as to the time when he was informed of sale, and upon it he says that he was informed yesterday or today an hour before, then his statement would not be accepted unless he produces proof,

(٧٦) ولو ان رجلا ادعى شفعة بالجوار قبل رجل لا يرى الشفعة بالجوار فانكر المدعى عليه وقال لا شفعة له كان القول قوله ويحلف بالله ما له قبلك شفعة على قول من يرى الشفعة بالجوار ولا يحلف بالله ما له قبلك شفعة في هذه الدار لانه لو حلف على هذا الوجه يحلف بالله بناء على مذهبه فيفوت حق المدعي -

76. If a person claims pre-emption by reason of neighbourhood against the person who does not accept ***shuf'a-bil-jawar*** (being of the ***Shafi'i*** sect), and if the defendant denies his right and says that he has no pre-emption, then his (defendant's,) statement is relied upon, and he would be asked to swear to the effect that the plaintiff had no right of pre-emption against him according to the Hanafi Law of ***shuf'a-bil-jawar***, and that he would not be asked to swear thus: 'that the plaintiff has no right of pre-emption against him in the house,' because if he swears in this way then he does so according to his beliefs, and the right of the plaintiff will be invalidated.

(٧٧) ولو ان دارين متلازقين بين رجلين تصدق صاحب احدى الدارين بالحائط الذي يلي جاره على رجل بما تحته من الارض وقبض المتصدق عليه ثم باع المتصدق داره من المتصدق عليه ذكر الناطفي رح انه لا يبقى الجار شفيعا فان طلب الجار يمين المشتري بالله ما فعل صاحب الدار ذلك ضرارا او فرارا من الشفعة على وجه التلجئة كان له ذلك لانه ادعى عليه معنى لو اقر به

77. If there are two houses joined together and which belong to two persons, and one of the owners gives away in *sadqah* the ***hait*** wall, adjoining the house of the neighbour together with the land on which it stands to a person, and the donee takes possession of it, and afterwards the donor sells this house to the donee, then according to Natifi, the neighbour is no longer entitled to pre-empt the house, and if the neighbour wants the vendee to swear to the fact that the donor did not do so to injure him and to avoid pre-emption, then he can do so because he claims such a fact against the vendee which if the vendee accepts he would be entitled to pre-emption, but if the vendee swears,

ازمته ويحلف فان
حلف لاشفعة له وان
نكل كان له الشفعة
لانه اقر انه جار ملازق -

then the neighbour is not entitled to pre-emption, and if the vendee refuses to swear then again the neighbour becomes entitled to pre-emption, because the refusal establishes him as *jar-i-mulaziq*.

(٧٨) رجل اشتري
من رجل عشر ارض
او دار بثمن كثير ثم
اشتري تسعة اعشا
رها بثمن قليل كان
للجار الشفعة في البيع
الاول دون الثاني
لانه بالبيع الاول
صار شريكا في نفس
البقعة فيكون هو اولي
من الجار في البيع
الثاني فان اراد الشفيع
ان يحلفه بالله ما
اردت بذلك ابطا
ل شفعتي قال الشيخ
الامام ابوبكر محمد بن
الفضل رح لا يحلفه
علي هذا الوجه
لانه لو اقر به لا يلزمه
شئي لكن لو اراد
ان يحلف المشتري
يحلفه بالله ان البيع
الاول ماكان تلجئة
كان له ذلك لانه ادعي
عليه معني لو اقر به يلزمه
فكان له ان يحلفه علي
هذا الوجه قال وما ذكر في
الاصل ان الشفيع اذا
اراد استحلاف انه لم

78. A man bought one-tenth part of a land or a house from a person at a higher price, and then he bought the remaining nine parts at a lower price, then in this case the neighbour is entitled to pre-empt the first purchase, but as regards the second sale transaction the vendee, by reason of the first purchase, has become a partner in the substance of the property, and so he is preferred to the neighbour in the second sale. If the pre-emptor wants the vendee to swear that by this act the vendee did not mean to avoid the right of pre-emption, then according to Imam Abu Bakr Muhammad bin Fazal, he cannot demand an oath on that account because if he admits it, yet it is not binding on him; but if the pre-emptor demands an oath from him to the effect that the first sale was not valid then he can do so; because if he admits then the pre-emptor becomes entitled to demand pre-emption in the second sale also. Imam Abu Bakr says that it is mentioned in the Asl that if the pre-emptor wants to demand an oath and does not mean to give up his claim of pre-emption, then he can do so,

يردبه ابطال الشفعة كان لذلک لانه ادعى ان البيع كان تلجئة •

(٩٧) رجلان تبايعا بيعا فطلب الشفيع الشفعة بحضرة البائع والمشتري فقال كان البيع بينهما بيع معاملة وصدقه المشتري في ذلک قال الشيخ الامام ابوبكر محمد بن الفضل رحمهما لايصدقان على الشفيع الا ان يكون البيع بثمن لايباع مثل ذلک المبيع بذلک الثمن لقلته فح يكون البيع بيع معاملة ولايكون للشفيع فيه الشفعة الاترى انه لوجرى هذا الاختلاف بين البائع والمشتري فقال البائع بعته معاملة وقال المشتري لابل كان البيع بيع رغبة ان كان البيع بثمن لايباع مثل ذلک المبيع بمثل ذلک الثمن لقلته كان القول قول البائع وان لم يكن كذلک كان القول قول المشتري وكذلک اذا وقع الاختلاف بينهما وبين الشفيع وقال القاضي الامام على السغدي رح وان باع بما لايباع مثله

because he has already sued upon the fact that the sale was valid.

79. Two persons make a transaction between each other and the pre-emptor demands pre-emption in the presence both of the seller and buyer, and then the vendor says to the vendee that it was *bai muamla*[1] between them which the vendee confirmed, then Imam Abu Bakr Muhammad bin Fazl says that in this case the confirmation will not be used against the pre-emptor, except in the case where the sale is made at such a low price that for which the property would not be sold. In this case the sale would be regarded as a *bai muamla* and the pre-emptor would not be entitled to pre-emption, but note if the same difference of opinion prevails between the vendor and the vendee, and the vendor says, I have sold it as *bai muamla* whereas the vendee says "no it was a *bai raghbat*,"[2] then if the sale was at such a low price that for which a property would not be sold at such a price, then the statement of the vendor should be relied upon, and if otherwise, then the statement of the vendee is trusted, and similar is the case if there is a difference of opinion between both of them and the pre-emptor. Kazi

1 An invalid sale, as understood by the parties.

2 A *bona fide* sale with the intention to transfer the property.

لايصدقان على الشفيع
ايضاً لان هذاقول العوام
ان الثمن اذاكان بحيث
لايباع بمثله لايجوز.

Imam Ali Saghadi says that if the property is sold at a price at which it is not expected to be sold, then even in this case also the confirmation of both of them as above will not be used against the pre-emptor, because it is only a common view (not of the jurists) that when the price is so low that a thing is not likely to be sold for it, then the sale is unlawful.

(٨٠) رجل اشتري
دارالابنه الصغير فاراداب
الشفيع ان ياخذ الشفعة
واختلفامع الشفيع في
الثمن كان القول قول
الاب لانه ينكر حق
التملك بماادعي من
الثمن واليمين على الاب
لان فائدة الاستحلاف
الاقرار ولواقرالاب بما
ادعى الشفيع لايصح
اقراره على الصغير.

80. If a person buys a house for his infant son, and there is another minor pre-emptor and the father of the pre-emptor intends to demand pre-emption in it, and if there is a disagreement with the pre-emptor as regards the price then the statement of the purchaser is relied upon because he denies the right of ownership of the plaintiff and he is not bound to swear, because the advantage of an oath is an admission, and if the father admits that which the pre-emptor claims, then his admission is not binding against the infant.

(٨١) رجل له دار
غصبها منه غاصب
والغاصب يجحد ملك
المغصوب منه فبيعت
دار بجنب هذه الدار
والمغصوب منه شفيع
الدار المبيعة والمشتري
يجحد الشفعة ويجحد
ان الدار المغصوبة له والا
ابن مقاتل رح يطالب

81. There is a certain property which is owned by a person, and which has been usurped by another person who denies the ownership of the rightful owner. In this case if a house which is adjacent to this preperty is sold, and the real owner of the adjoining house demands pre-emption in the house sold, but the vendee denies the right of pre-emption to him, and also denies

المغصوب منه شفعة
الدار المبيعة ثم يخاصم
المشتري والغاصب الى
القاضي ويقول هذه
الرجل اشترى هذه
الدار وقد طلبت منه
الشفعة ولي شفعتها بهذه
الدار التي غصبني هذا
الغاصب فان اقام البينة
ان الدار المغصوبة له
قضى القاضي له بالدار
المغصوبة وبالشفعة ايضا
وان لم يكن له بينة
حلف الغاصب والمشتري
فان نكل الغاصب عن
اليمين وحلفه المشتري
قضى القاضي له بالدار
المغصوبة على الغاصب
ولا يقضى له بالشفعة لان
نكول الغاصب يكون
حجة على الغاصب دون
المشتري وان حلف
الغاصب ونكل المشتري
قضى القاضي له بالشفعة
ولا يقضى له بالدار
المغصوبة لان نكول
احدهما يكون حجة
عليه دون الاخر .

in adjoined property the ownership of the pre-emptor then Ibn Qatil says that the owner of the property must demand pre-emption in the house sold, and afterwards must sue the vendee and the usurper, ***ghasib***, alleging that the vendee has purchased the house, and he has demanded pre-emption from him, and has a right of pre-emption in the house sold by reason of the property which has been usurped by this usurper. If he produces evidence, then the Kazi must decree in his favour the ownership of the usurped property and also the right of pre-emption in the house sold, but if he does not produce proof, then he may demand an oath from the vendee and the usurper, and if the usurper refuses to take an oath, but the vendee swears, then the Kazi will decree the ownership of the property in favour of the pre-emptor, but will not decree pre-emption in his favour, because the refusal of the usurper to swear merely established the right of ownership against him without any regard to the right of the vendee, but if the usurper swears and the vendee refuses to swear, then the Kazi would decree pre-emption in favour of the pre-emptor but would not decree ownership of the property to him, because the refusal to swear establishes the right against the person who refuses and not against the person who swears.

(٨٢) واذاتوجه القضاء بالشفعة كان القاضي لا يقضي بالشفعة حتى يحضر الشفيع الثمن فان قال الشفيع اقض لي بالشفعة ودعها على حالها ولا تسلمها حتى آتيك بالثمن قال محمد رحمه الله لا يجيبه القاضي الى ذلك فان قال الشفيع ان لم اجئ بالثمن الى ثلثة ايام فانا بريء من الشفعة فلم يجئ بالثمن الى ذلك الوقت ذكر ابن رستم عن محمد رحمه الله انه يبطل شفعته لان تسليم الشفعة اسقاط محض فيصح تعليقه بالشرط وقال بعض المشائخ رحمهم الله لا تبطل شفعته وهو الصحيح لان الشفعة متى ثبتت بطلب المواثبة والاشهاد تأكدت لا تبطل ما لم يسلم بلسانه —

82. When the Kazi is of opinion that it is necessary to pass a decree of pre-emption in favour of the pre-emptor, he must delay in passing the decree, until the pre-emptor produces the price before the Court, but if the pre-emptor desires the Kazi simply to decree pre-emption without actually handing over the possession of the subject of pre-emption to him, until he pays the price then, according to Imam Muhammad, the Kazi cannot agree to this proposal but if the pre-emptor says "if I do not bring the price within three days I will forfeit my right," and then he does not bring the price within that period, Ibn-i-Rustam relates from Imam Muhammad that his right of pre-emption is invalidated, because the surrender of the right invalidates pre-emption, but making a condition to the acquisition of pre-emption is lawful, and some jurists hold that his right of pre-emption is not invalidated, and this is the correct view because since pre-emption is established by *talab-i-muwasabat* and *talab-i-'ishhad* it cannot be invalidated unless it is actually surrendered by a word of mouth.

(٨٣) وكذا لو قال المشتري للشفيع هات الدراهم وخذ شفعتك فان امكنه احضار الدراهم في ثلثة ايام ولم يحضر بطلت شفعة عند محمد رحمه الله ولو ان

83. And similarly if the vendee says to the pre-emptor to bring ***dirhams*** and take the subject of pre-emption, and it was possible for him to bring the ***dirhams*** within three days, but he did not bring the amount then according to Imam Muhammad, his right of

الشفيع احضر الدنانير
والثمن دراهم اختلفوا
فيه والصحيح انه لا تبطل

pre-emption is invalidated, but if the pre-emptor brought *dinars*[1] whereas the price was to be paid in *dirhams*, then in this case opinions differ, and the correct view is that the right of pre-emption is not invalidated.

(٨٤) الوكيل بشراء
الدار اذا كان شفيعها قالوا
لو يطلب الشفعة من
الموكل وليس هو كمن
اشترى لنفسه وهو شفيع
فانه لا يحتاج الى الطلب
قالوا ولو قيل ان
الوكيل يقوم مقام
الموكل في هذا حتى
لا يحتاج الى الطلب
لا يبعد والاول اعجب
الوكيل بالشراء اذا
اشترى وجاء الشفيع
يطلب الشفعة من
الوكيل قال بعضهم ان كان
الوكيل يسلم الدار الى
الموكل لا يصح الطلب
منه وهكذا روى عن
محمد رح ان الوكيل
لا يبقى خصما بعد
التسليم الى الموكل
وان كان الوكيل لم يسلم
الى الموكل يصح الطلب
منه وهو خصم وقال
الشيخ الامام ابوبكر
محمد بن الفضل رح
والقاضي الامام علي
السغدي رح صح الطلب

84. When an agent who purchases a house is also its pre-emptor then the jurists hold that he should demand pre-emption from the principal, and his position is not similar to a person who purchases the house for himself and is also its pre-emptor, he is not required to make the demand. The jurists observe that if it is argued that the acts of the agent are considered, as acts of the principal, hence the agent is not bound to make the demand, then this view is not far from expressing the same thing, but the first view is better. If the agent purchases a house, and the pre-emptor proceeds to demand pre-emption from him, then some jurists hold that if the agent had delivered the possession of the house to the principal, the pre-emptor's demand to him is invalid, and the same is narrated from Imam Muhammad, because the agent could not continue to be a party to the suit after transfer of the house to the principal, but if the agent had not yet delivered possession of it to the principal, the demand is valid, and the agent will be a party to the suit. But Imam

[1] A gold coin about a half *masha* in weight.

منه سلم اولم يسلم لانه في حكم الحقوق عاقد لنفسه. فكان بمنزلة المشتري يكون خصما في طلب الشفعة كانت الدار في يده اولم تكن -

Abu Bakr Muhammad bin Fazl and Kazi Imam Ali Saghadi hold that the pre-emptor's demand is valid whether the agent has or has not handed over the house to the principal, because the effect of the order equally binds the agent and he is in the position of the vendee, and can be made a party to the suit whether the house is in his possession or not.

(٨٥) رجل اشتري دارا بالكوفة بكر حنطة بغير عينه فخاصمه الشفيع الى القاضي بمرو والدار بالكوفة اوبمرو وقضى القاضي له بالشفعة ذكر في النوادر ان كانت قيمة الكر في الموضعين سواء اعطاه الشفيع الكر حيث قضى له بالشفعة وان كانت القيمة متفاضلة فان كان الكر في الموضع الذي يريد الشفيع ان يعطي اعلى قيمة فذلك الى الشفيع يعطيه حيث شاء وان كان ارخص ورضي المشتري بذلك فكذلك يعطيه الشفيع حيث شاء وان لم يرض المشتري بذلك اعطاه الشفيع في الموضع الذي يكون قيمة الكر فيه مثل قيمته في موضع الشراء.

85. If a person exchanges a house at Kufa for unascertained quantity of wheat and the pre-emptor brings a suit against him before the Kazi at Marva, and suppose that the house is either in Marva or Kufa, and the Kazi decrees pre-emption, then it is mentioned in the Nawadir that if the price of wheat is equal in both the places, the pre-emptor will give that much of wheat for which the vendee exchanged the house in the town where pre-emption is decreed, but if the price differs in both the places, and the pre-emptor finds that the price is high in the town where he wishes to give wheat, he has an option to give it wherever he pleases, and if the price is low and also the vendee agrees to take it in the same town, then also the pre-emptor has an option to give the same quantity of wheat to the vendee wherever he pleases, but if the vendee disagrees then the pre-emptor should give the wheat in the town where the price of

wheat is equal to that of wheat in that own where the house was purchased.

(٨٦) رجل اشتري ارضا بمائة درهم ورفع منها التراب وباع التراب بمائة درهم ثم جاء الشفيع وطلب الشفعة قال الشيخ الامام ابوبكر محمد بن الفضل رح يأخذ الشفيع الارض بنصف الثمن وهو خمسون درهما يقسم الثمن على قيمة الارض قبل دفع التراب وعلى قيمة التراب المرفوع ثم يطرح عن الشفيع قيمة التراب وقال القاضى الامام على السغدي رح لايطرح عن الشفيع نصف الثمن وانما يطرح عنه بحصة النقصان فلو ان المشتري كبس الارض بعد مارفع منها التراب فاعادها كما كانت قبل ان يحضر الشفيع ثم حضر الشفيع الامام ابوبكر رح يقال للمشتري ارفع من الارض بقدرما احدثت فيها ثم يكون الجواب فيه على ماقلنا -

86. A person buys a land for *dirhams* 100/, and digs out its *turab*, mud, and sells it for *dirhams* 100/, afterwards when he had done so, the pre-emptor appears and demands pre-emption, then Shaikh Imam Abu Bakr Muhammad bin Fazal says that the pre-emptor can take the land at half of the price of the land. That is at *dirdams* 50,/ because the sale-consideration would be apportioned between the land and the *turab* extracted from it, and the price of the *turab* extracte l would be reduced in favour of the pre-emptor; but Kazi Imam Ali Saghadi says that half of the price will not be remitted to the pre-emptor, but that much of the price will be remitted by which the land has been damaged. If the vendee fills up the land after he has excavated it, and has made it as it was originally, and afterwards the pre-emptor appears then Imam Abu Bakr says that the vendee should be asked to excavate the land to the extent filled up, and then the price is to be reduced according to the above views.

(٨٧) المشتري اذا تشفع الى الشفيع واستمهله شهرا فامهله ثم رجع الشفيع وطالبه في

87. If the vendee requests the pre-emptor to allow him one month's respite and he allows that time but later on the pre-emptor retracts

الحال كان له ذلك —

his promise, and at once demands pre-emption, then he can do so.

(٨٨) المشتري مع الشفيع اذا اختلفا في الثمن كان القول قول المشتري مع يمينه وان اقام البينة على ما ادعى يقضي ببينة الشفيع في قول ابي حنيفة رح و محمد رح وقال ابويوسف رح البينة بينة المشتري —

88. If the vendee and the pre-emptor differ as regards the price, then the words of the vendee on oath would be relied upon, but if the pre-emptor produces evidence upon his claim, then according to Imam Abu Hanifa and Imam' Muhammad the evidence of the pre-emptor would be preferred, but Imam Yusuf holds that the evidence of the vendee would be preferred.

(٨٩) الشفيع اذا اخذ الدار من البائع كانت عهدة على البائع وان اخذها من المشتري كانت عهدة على المشتري وللشفيع خيار رؤية وله ان يرد بالعيب وهو بمنزلة المشتري في ذلك وانكان المشتري اشتري الدار على ان البائع بري من كل عيب بها اوكان بها عيب علم المشتري بذلك ورضي كان للشفيع ان لايرضي بالعيب ويرد —

89. If the pre-emptor takes the house from the vendor, then the vendor is held responsible to the pre-emptor, and if he takes it from the vendee, then the vendee is bound to the pre-emptor, and the pre-emptor has an option of inspection and defect, in short he is in the position of a vendee, and if at the time of purchase, the vendee accepts the condition that vendor is not to be responsible for any defect in the house, or that he was aware of the defect in the house but did not object to it then also the pre-emptor has the option to decline to take it and return the house.

(٩٠) الشفيع اذا اخذ الدار بالشفعة وبنى فيها ثم استحقت الدار رجع الشفيع بالثمن على من اخذ منه الدار ولايرجع

90. If the pre-emptorp re-empts a house and adds some construction to it and afterwards the right of ownership of some other person is established in that house, then the pre-emptor is only entitled to take the price paid back from the per-

بقيمة البناء على احد بخلاف المشتري فان المشتري لمايرجع بالثمن على البائع يرجع بقيمة البناء ايضا -

son from whom he took the house but he cannot demand the expenses incurred in building new constructions, contrary to the case of vendee who having purchased a house builds something, and now if he can demand the price from the seller he can also recover the expenses incurred by him.

(٩١) الشفيع اذا وكل رجلا يا خذ الشفعة جاز توكيله فان قال المشتري بعد ماأثبت الوكيل الشفعة انا اريد يمين الشفيع انه لم يسلم يقال له سلم الدار الى الوكيل واتبع الموكل وحلفه وهو كالوكيل بقبض الدين اذا ادعى المدعى المديون ان الموكل ابراه عن الدين فانه يومر يدفع الدين الى الوكيل ويقال له اتبع الموكل وحلفه على ما يدعي -

91. If the pre-emptor appoints a person to be his agent to demand pre-emption on his behalf, then he can do so. If after the agent has proved his case on behalf of pre-emptor, and the vendee desires to demand an oath from the pre-emptor that he surrendered the right of pre-emption, then he (the vendee) would be asked to hand over the house to the agent, and afterwards would be allowed to sue the principal and demand an oath from him. Here the agent has the same legal responsibilities as the agent appointed to collect debts on behalf of the principal. If the debtor asserts the fact that the principal remitted the debt to him, then the debtor would be asked to hand over the debt to the agent, and thereafter he should sue the principal, and demand an oath from him.

(٩٢) رجل اشتري دارا بالجياد ونقد الزيوف فتجوزبه البائع فان الشفيع ياخذ بالجياد لانه اشتراه

92. A person bought a house for genuine coins but at the time of payment he paid counterfeit coins to the vendor which was accepted. In this case if the pre-emptor wants to pre-empt the house

بالجياد •

he cannot do so by paying counterfeit coins for he must pay genuine coins because the house was purchased for genuine coins.

(٩٣) رجل اشتري اوضا بمائة درهم وقبضها فحضر الشفيع وطلب الشفعة وسلمها اليه المشتري بمائة درهم ثم ان المشتري نقد الثمن للبائع فوهب له البائع منها خمسة بعدما اخذ المائة فعلم الشفيع بالهبة ليس له ان يسترد شيئا من المشتري من الثمن ولو ان البائع وهب من المشتري خمسة من الثمن قبل قبض الثمن والمسئلة بحالها كان للشفيع ان يسترد من المشتري ماوهب له من البائع لان هبة شئي من الثمن قبل قبض الثمن حط والحط يلتحق باصل العقد فكان للشفيع ان يسترد من المشتري قدرما حط عنه البائع اما بعد قبض الثمن هبة البعض ليس بحط بل هو تمليك مبتدأ كانه وهب له مالا اخر -

93. If a person buys a land for *dirhams* 100 and enters on its possession, and afterwards the pre-emptor appears and demands pre-emption, and the vendee, after taking *dirhams* 100 from the pre-emptor, hands over the land to the pre-emptor and thereafter he paid over the sum to the vendor, and the vendor after receiving the sum from the vendee returned to him five *dirhams* as a gift, and if afterwards, this report reaches the pre-emptor he cannot demand five *dirhams* from the vendee. But if the vendor had given him five *dirhams* as a gift before the vendee had received the sale-consideration from the pre-emptor then the pre-emptor can demand five *dirhams* from the vendee, because to grant something as a gift in the price before receiving the same is to reduce the price, and reduction in the price becomes a part of the transaction, and the pre-emptor is entitled to deduct that much from the price which is reduced by the vendor as a gift in favour of the vendee, but after the receipt of the price, granting or remitting some money, as a gift, does not amount to reduction in the price, in fact it is deemed as a transfer or a gift of some distinct property.

(٩٤) الوكيل بالبيع إذا باع الدار بألف ثم إن الوكيل حط عن المشتري مائة من الثمن صح ويضمن قدر المحطوط للآمر ويبرأ المشتري عن المائة ويأخذ الشفيع الدار بجميع الثمن لأن حط الوكيل لا يلتحق بأصل العقد -

94. If the vendor appoints an agent to sell a house, and he sells it for 1000/, and thereafter he reduces the price by 100/ in favour of the vendee, then he is entitled to do so, but he is bound to pay 100/ to the vendor, though the vendee has been released from the obligation, and the pre-emptor would have to pay the full price, because the reduction by the agent in the price cannot be considered as a term of the original contract.

(١٥) رجل اشترى نصفا شائعا من دار أو جزءا شائعا منها ثم إن المشتري قاسم البائع وحضر الشفيع فإن كانت القسمة بقضاء القاضي فإن الشفيع يأخذ من المشتري ما صار له بعد القسمة وليس له أن يبطل القسمة رواية واحدة وإن كانت القسمة بغير قضاء هل له أن يبطل القسمة فيه روايتان والصحيح أنه لا يبطل وله أن يأخذ بالشفعة ما صار للمشتري -

95. A person buys an undivided half of a house or a portion of it, and after the vendee had a particular portion assigned to him by the vendor, the pre-emptor appears, then if the partition was effected by a decree of the Kazi, the pre-emptor has no other remedy but to take the very portion assigned to the vendee, and according to all jurists he is not entitled to have the partition set aside. As regards the partition effected without the decree of the Kazi there are two conflicting ***riwayats***, reports, the correct view is that the pre-emptor cannot invalidate the partition, and can take only the part assigned to the vendee.

(٩٦) ولو أن رجلين اشتريا دارا وهما شفيعان ولها شفيع ثالث أيضا فاقتسم المشتريان ثم حضر الشفيع الثالث

96. If two pre-emptors, jointly purchase a house and there is a third person who is also a pre-emptor in the same house, later on the two joint purchasers divide

the house between them, thereafter the third pre-emptor pre-empts, then he has the right to annul the partition, no matter whether it was effected by or without the decree of the Kazi. If a person buys a house in which there are two pre-emptors, one of which is absent and only the present pre-emptor makes the demand, and the Kazi decrees pre-emption in his favour, thereafter the second pre-emptor appears, then he must demand pre-emption from the first pre-emptor to whom pre-emption has been decreed and not from the vendee, because now the first pre-emptor stands in the position of the vendee, but this should be done when the first pre-emptor had pre-empted the whole of the house; for if he had demanded only half of it believing that he is entitled only to that much, then his right of pre-emption is extinguished. Similarly if they are two pre-emptors and each one of them demands in pre-emption half of the house then their right of pre-emption is invalidated, because since each one of them has not pre-empted the whole of his right of pre-emption in that half which he has omitted to pre-empt is invalidated, and hence when his right is invalidated in one-half it is invalidated in the whole.

كان له ان يبطل القسمة كانت القسمة بقضاء او بغير قضاء رجل اشترى دارا ولها شفيعان احدهما غائب فطالب الحاضر الشفعة نقضي له القاضي ثم جاء الشفيع الثاني فان الثاني يطالب الشفعة من الشفيع الحاضر الذي قضى له القاضي لامن المشترى لان الشفيع الاول قام مقام المشترى هذا اذا طالب الشفيع الحاضر جميع الدار بالشفعة فان طالب النصف على ظن انه لايستحق الا النصف بطلت شفعته - وكذا لوكان حاضرين فطالب كل واحد منهما الشفعة فى النصف بطلت شفعتهما لان كل واحد منهما لما لم يطالب الكل بطلت شفعته فى النصف الذي لم يطالب واذا بطلت شفعة فى النصف بطل فى الكل -

97. If a person sells to another person a house which has been rented to

(۹۷) رجل باع دارا وهى فى اجارة

رجل والمستاجر شفيعا
جاز البيع فی حق
البائع والمشتري
ويتوقف في حق
المستاجر فان اجاز
المستاجر البيع نفذ البيع
لزوال ما يوجب التوقف
ويكون للمستاجر ان
ياخذ الدار بالشفعة
وهو بخلاف مالو
باع دارا على ان
يكفل فلان بالثمن
اوبالدرك وفلان شفيع
الدار فكفل الشفيع
بطلت شفعته لان
الكفالة اذا شرطت في
البيع كان تمام البيع
بالكفالة فيصير الكفيل
بمنزلة البائع اما ههنا
البيع كان تاما جائزا
بين البائع والمشتري
ولا يصير المستاجر
بالاجارة بمنزلة البائع فلا
يبطل شفعته ولو ان
المستاجر لم يجز البيع
ولكنه طلب الشفعة كان
طلب الشفعة نسخا
للاجارة-

a tenant who is also its pre-emptor, then the sale is valid and effective as between the vendor and the vendee, but as against the tenant it will depend upon the attitude of the tenant, that is if the tenant permits, the sale becomes completely effective, because the cause has been set aside and at the same time the tenant is entitled to pre-empt the house. On the other hand if a house is sold on a stipulation that a paticular person is responsible for its price in case loss were to accrue, and the same person happens to be its pre-emptor, and he accepts the suretyship, his right of pre-emption is invalidated, for since a condition has been stipulated, which depends for its fulfilment on the surety who is as if in the position of the vendor, while in the previous case the sale between the vendor and the vendee was lawful, and the tenant was not in the position of a vendor, and so his right of pre-emption was not invalidated. However if the tenant does not agree to the sale, but he himself demands pre-emption then the fact of his demanding pre-emption determines the contract of tenancy between him and the landlord.

(٩٨) رجل اشتري
دارا فحضر الشفيع
واراد ان ياخذ الدار
فقال المشتري احدث
فيها هذا البناء

98. A person buys a house, thereafter the pre-emptor appears and intends to take the house in pre-emption, and if the vendee states that he has made certain improvements, in the house

ولوقال الشفيع لابل
اشتريتها مبنية كماهي
كان القول للمشتري وان
اقاما البينة كانت بينة
الشفيع اولى وكذا لو
اشترى ارضا فحضر
الشفيع فاراد ان يأخذ
الدار وفيها اشجار
واختلفا على هذا
الوجه وانما يكون القول
قول المشتري اذا لم يكن
مكذبا ظاهرا او اذا كان
مكذبا ظاهرا بان قال
احدثت فيها الاشجار
الآن لايقبل قول
المشتري وان قال
اشتريت منذ عشرين
يوما واحدثت فيها الا
شجار قبل قوله اذا بين
وقتا لايكذبه الظاهر ·

whereupon the pre-emptor says, "No, you have purchased it as it stands now," then in this case, the statement of the vendee would be preferred but if they produce evidence, then the evidence of the pre-emptor would be preferred. Similarly if after a person purchased the land, the pre-emptor appears and intends to pre-empt the land and he finds that *shajar*, planted trees, are growing on it, and they disagree as to the fact whether the *shajar*, trees, were on the land or have been planted by the vendee then the statement of the vendee would be relied upon provided the facts are not apparently false, for if they are false, that is if the vendee says "I have just now planted these trees," then in this case the statement of the vendee would not be trusted, but if he says, "I purchased it twenty days hence, and I planted trees," then his statement would be accepted provided it is a reasonable period and so his statement does not appear to be false at all.

(٩٩) وان قال
المشتري اشتريت
البناء بخمسمائة درهم ثم
اشتريت الارض بعد
ذلك اوقال اشتريت
الارض بدون البناء اولا
ثم اشتريت البناء بعقد
آخر فلا شفعة لك في
البناء لانه نقلي صار

99. If the vendee states that he has purchased the building first for *dirhams* 500 and afterwards, the land or if he states that he first purchased the land apart from the building, and then purchased the building by a second contract of sale, and therefore the pre-emptor has no right of

مقصود اوقال الشفيع
لابل اشتريتهما معا في
صفقة واحدة في القياس
يكون القول قول
المشتري وفي الا
ستحسان يكون القول
قول الشفيع لان
المشتري ينكر الشفعة
في البناء لتفرق
الصفقة بعد قيام سبب
الشفعة ظاهرا لا يقبل
قول المشتري ولوقال
المشتري وهب لي
البناء اولا ثم اشتريت
الارض كان القول قول
المشتري وياخذ الشفيع
الارض بدون البناء
وكذا لوقال اشتريت
النصف ثم النصف
وقال الجار وهو
الشفيع اشتريت الكل
بعقد واحد كان
القول قول الشفيع
استحسانا وان اقاما
البينة كانت البينة بينة
المشتري في قول ابي
يوسف رح لانه
هوالمحتاج الي البينة
وعلي قول محمد رح
البينة بينة الشفيع فان
ادعى المشتري انه
اشتري الكل معا بعقد
واحد وادعى الشفيع
انه اشتراه متفرقا كان
القول قول المشتري

pre-emption in the building, it also turned into moveable property, whereupon the pre-emptor answers, "no, you have purchased them by one single transaction," then according to the doctrine of *qias* the statement of the vendee would be preferred, but according to *istehsan* the statement of the pre-emptor would be preferred, because the vendee denies pre-emption in the building on the basis of separate transaction after the cause of pre-emption had accrued, and so his statement cannot be relied upon; but if the vendee had stated that the building was granted to him as a gift which constituted the first transaction, and that he afterwards purchased the land, then the statement of the vendee will be preferred, and the pre-emptor would only be entitled to pre-empt the land apart from the building. And similarly if the vendee states that he first bought half of the house and afterwards the other half, and the neighbour who is a pre-emptor says, "no, you have bought the whole of it in one transaction," then according to *istehsan*, the statement of the pre-emptor is preferred but if they produce evidence then according to Imam Abu Yusuf the evidence of the vendee would be trusted, because the vendee only requires proof, but according to Imam Muhammad, the evidence of the pre-emptor

وان قال المشتري وهب لي هذا البيت من الدار بطريقه الى باب الدار ثم باعني مابقي من الدار بالف درهم وقال الشفيع بل اشتريت كل الدار بالف درهم كان القول قول المشتري في البيت فيأخذ الشفيع كل الدار ان شاء غير البيت وطريقه بالف فان جحد البائع هبة البيت كان القول قوله مع يمينه وان صدق البائع المشتري فيما قال كان البيت الموهوب له ولا يصدقان على ابطال الشفعة في الدار لان شركة المشتري قبل شري الدار لاتظهر في حق الشفيع بقولهما الا ان يقيم البينة على الهبة قبل شراء الدار فيصير المشتري شريكا في الدار فيقدم على الجار

رجل اشتري دارا فادعى الشفيع ان المشتري هدم طائفة من الدار وكذبه المشتري كان القول قول المشتري والبينة بينة الشفيع وان لم يوقت شهود صاحب الشفعة يقضي بالبيت بينهما

should be preferred; but if the vendee asserts that he bought the whole house in one transaction, whereas the pre-emptor sues upon the fact that he bought it by separate transactions, then the statement of the vendee would be trusted. If the vendee states that he was granted, first as a gift, a house of the enclosure together with its passage which leads from the door of the enclosure, and that afterwards he bought the rest of the enclosure for *dirhams* 1000, but the pre-emptor states that the vendee purchased the whole of the enclosure for *dirhams* 1000, then the statement of the vendee as regards the house would be trusted, and the pre-emptor may, if he chooses, pre-empt the whole of the enclosure except the house and its passage for *dirhams* 1000; but if the vendor denied the gift of the house, then his statement on oath would be preferred and if he confirms the statements of the vendee, then the house would be taken to have been made over to the vendee as a gift, but it would not be trusted as regards the invalidation of the right of pre-emption in the enclosure, because the partnership of the vendee before the purchase of the enclosure was not disclosed at all, but where prior to the purchase the vendee had produced proof of the gift of the house to him then he became a partner in the enclosure and is therefore preferred to the pre-

نصفين لاستوائهما فى
الحجة ويقضى ببقية
الدار الذي اقام البينة
على شراء كل الدار
والشفعة لاحدهما على
الاخر لانه لم يثبت سبق
شراء احدهما -

emptor. A person purchased an enclosure, and then the pre-emptor filed a suit against the vendee stating that he pulled down a portion of the house and the vendee denied, then the statement of the vendee would be preferred but if they produce evidence, then the evidence of the pre-emptor would be preferred, and if the witnesses of the pre-emptor did not prove the time (of sale) then the Kazi would decree one half of the house to the vendee, and the other half to the pre-emptor, because as regards proof both of them are equal,* but the rest of enclosure would be decreed in favour of one who produces evidence upon the purchase of the entire enclosure, and no one has the right of pre-emption against the other in virtue of his purchase.*

(١٠٠) ولو اختصما
فى الدارين المتلازقين
فاقام احدهما البينة انه
اشتري هذه الدار بالف
منذ شهر واقام الاخر
البينة انه اشتري هذه
الدار الاخري منذ
شهرين يقضى الثانى
بشري الدار الاخري
منذ شهرين كما شهد
شهوده ويقضى له ايضا

100. If two persons are litigating concerning two houses which are joined to one another, and then one of them produces evidence upon the fact that he purchased this particular house for 1000/ about a month ago and the other similarly produces evidence to the effect that he purchased that house two months ago, then the Kazi would decree the suit in favour of the latter, and he is also entitled to the decree of pre-emption in the other house,

* This passage is not clear; it seems it contemplates the case discussed in the next section.

بالشفعة فى الدار
الاخري لان جواره سبق
على بيع الدار الثانية
واولم يوقت شهوده
يقضى لكل واحد منهما
بداره والشفعة لواحد
منهما وجعل كان البيعين
كانا معاولو وقت احدهما
ولم يوقت الاخر يقضي
لصاحب الوقت بالشفعة
على الاخر ٠

because he became a neighbour prior to the sale of the house; but if the time of sale is not proved by the witnesses, then each party would be entitled to have a decree of his own house and they have no right of pre-emption and the sales would be considered as distinct transactions to have taken place at one and the same time; but if one of them proves the time of purchase, while the other does not, then the right of pre-emption would be decreed in favour of him who has proved the time of purchase.

فصل فيما للشفيع
ان ياخذ البعض
اولا ياخذ *

Chapter, discussing whether a pre-emptor can pre-empt a portion of the property.

(١٠١) رجل اشتري
ارضا فآجرها من الجار
بالشراء اودفعها مزارعة
اوكان فيها نخل فدفع
النخيل معاملة اوساومه
الجار بعد علم الجار
بالشراء بطلت شفعة
الجار لان اقدامه على
هذه التصرفات بعد
العلم بها رضا منه بقرار
ملك المشتري فيبطل
شفعته —

101. If a person purchased a land, thereafter rented it to its *shafi-i-jar*, or leased it to a certain person for cultivation, or if there were trees on it, he entrusted their rearing and care to some person or that the *shafi-i-jar* after he had knowledge of the sale agreed to the exercise of the rights of ownership by the vendee, then his right to pre-empt would be invalidated because in spite of his knowedge of the purchase or so many transactions, he made no demand and this is a clear proof that he agreed or consented to the establishmet of the vendee's ownership in the land, therefore his right is invalidated.

(١٠٢) ولو اشتري
نخلا ليقطع ثم اشتري
الارض بعد ذلک قال
لاشفعة للشفيع فى
النخيل لانه نقلى وكذا
لواشتري الثمر ليجزها
والبناء ليهدمه ثم اشتري
الارض بعد ذلک كان
الشفيع الشفعة فى الارض
خاصة .

102. If a person purchases some trees to cut them down, later on purchases the land also, then the pre-emptor is not entitled to pre-empt the trees, because they are moveables, and similarly if he purchases the fruits to separate them from the trees, or the building to pull it down, and afterwards purchases the land, then the pre-emptor is entitled to pre-empt the land only.

(١٠٣) ولو اشتري
قرية فيها بيوت واشجار
ونخل ثم انه باع
الاشجار والبناء فقطع
المشتري بعض الاشجار
وهدم بعض البناء ثم
حضر الشفيع كان له
الارض ومالم يقطعه من
الاشجار ومالم يهدمه
من البناء وليس له ان
ياخذ ماقطع ويطرح عن
الشفيع حصة ماقطع من
الشجر وما هدمه من
البناء لانه صار مقصود
ابالاخذ قسطا من
الثمن -

103. If a person buys a village in which there are several houses, trees, *shajr* and *makhl*[1] thereafter he sells the trees and the buildings, and the new vendee cuts down several of the trees and destroyed some of the buildings, and later on the pre-emptor appears, then he is entitled only to take the land, and those buildings and trees which have not yet been destroyed by the second vendee, and is not entitled to take what has been cut down, but the price of the trees cut down and the buildings destroyed would be deducted from the sale-consideration for the benefit of the pre-emptor, because in the second sale all these things were the subjects of sale and so their price would be deducted in lieu of them.

(١٠٤) رجل اشتري
نهر ابا صله ولرجل ارض
فى اعلى النهر لجنبيه
ولاخر ارض فى اسفل

104. If a person purchases a canal and on one extremity of it the land belongs to one person and on the other to some other person, then

---

[1] Date trees.

النهر الي جنبه فلهما الشفعة جميعا في اصل النهر من اعلاه الي اسفله وكذا القناة والبير والعين لانها من العقارات ويستحق بالشفعة وكذا القناة مفتحها في ارض وظاهر ماؤها في ارض اخري فجيران القناة من مفتحها الى مصبها شركاء في الشفعة رجل له نصيب في نهر فهوا حق بالشفعة ممن يجري النهر في ارضه لان الذي يجري النهر في ارضه جار وصاحب النصيب في النهر شريك في المبيع فكان مقدما علي الجار –

they both are entitled to pre-empt the canal from one extremity to the other, and the same rule applies to *bunds*, wells and streams because they are included among *'aqar*, and are fit subjects of pre-emption, and the same holds true of that *bund* in which water runs from one land and flows into another, so that the people who live by the side of it from one end to the other, are equally entitled to pre-empt the *bund*. The person who is a partner in the canal has a superior right of pre-empting the canal to the person across whose land the canal flows, because the person through whose land the canal passes is a neighbour of the canal whereas the former is the partner in the canal, and so he is preferred to the neighbour.

(١٠٥) رجل له ارض كثيرة المؤن والخراج لا يشتريها احد فباعها من انسان مع دار له قيمتها الف وخمسمائة بالف وخمسمائة وللدار شفيع ايأخذ الدار بالشفعة ولا يأخذ الارض قالوا ان كانت الارض بحال يشتريها احد من اصحاب السلطان قسم الثمن وهو الف وخمسمائة علي الدار وعلي قيمة الارض وهي القدر الذي يشتريها احد من

105. A person owns a land in which he has to work hard and also to pay a heavy revenue therefore no one buys it. Hence he sells it together with a house of the value of *dirhams* 1,500 for *dirhams* 1,500 only. In this case there is a person who is the pre-emptor of the house. The question is whether the pre-emptor can take the house together with the land in pre-emption? The jurists are of opinion that if the land is such that the officers of the state would purchase it, then the price 1,500 *dirhams* would be apportioned between the house and the

اصحاب السلطان فياخذ الشفيع الدار بذلك ان رضي به المشتري وانكانت الارض بحال لايشتريها احد من اصحاب السلطان ولكنه ينتفع بها نيظر الي قيمة الارض في اخرالوقت الذي ذهبت رغبة الناس عنها ثم يقسم الثمن علي ذلك لانه اذا لم يكن لها قيمة في الحال يعتبر قيمتها في اخرالوقت الذي كانت متقومة وذهبت رغبة الناس عنها -

land and such price, as would induce an officer to purchase the land for, would be considered to be the price of the land, and the pre-emptor would be entitled to take the house at the residue of the original price provided the vendee agrees; but if the land is such that an officer would not purchase it but there is some advantage from it, then the highest price of the land at the time when the people were disinclined to purchase should be ascertained, and then the sale consideration would be apportioned accordingly, since at present the land is of no value then its value would be taken to be its highest price at which purchasers were found last.

(١٠٦) رجل اشتري دارين في موضعين مختلفين احدهما بالشام والاخري بالعراق في صفقة واحدة فانكان الشفيع شفيعا للدارين جميعا فانه ياخذ الدارين وليس له ان ياخذ احد الدارين وان اشترى الدارين في صفقتين فاراد الشفيع ان ياخذ احدي الدارين كان له ذلك وانكان هو شفيعا للدارين جميعا -

106. A person buys two houses in two different places, one in Sham and the other in Irak, by one transaction of sale, and if there is a common pre-emptor of these houses, then he is entitled to pre-empt the two houses together but he can not take one of them only. If a person buys two houses by two different transactions of sale, and the pre-emptor intends to take one of the houses, then he is entitled to do so, although he happens to be the pre-emptor of both the houses.

(١٠٧) رجل اشتري خمس منازل من رجل واحد في سكة غير نافذة بصفقة واحدة

107. A person purchased five houses situated in a private lane from a certain seller by one transaction of sale. In this case, if the pre-emptor intends to pre-empt

one house only, then jurists say that if he demands pre-emption because of partnership in the way, he cannot do so, for it is not proper that the transaction should be divided, but if he demands pre-emption by reason of neighbourhood to the house which he intends to pre-empt, he can do so. The result is that if a person purchases properties in two different places or he purchases two gardens or two houses in different places, and the transactions are separate, that is he purchased the two houses separately, and there is a common pre-emptor, then he has the option to pre-empt any one of the houses, but if the vendee had purchased them by one single transaction, and there is common pre-emptor to them, then he cannot pre-empt only one of them, he must either pre-empt both of them or give up his right of pre-emption. If the pre-emptor is not a common pre-emptor and is the pre-emptor in one house only, and the houses have been purchased by one transaction of sale, then in this case reports from Imam Abu Hanifa differ, but his final view is the same as that of Imam Muhammad and Imam Abu Yusuf that is the pre-emptor can pre-empt that house only of which he is the pre-emptor, just as when a person purchases a slave and a house together by one transaction of sale, then the pre-emptor can pre-empt

فاراد الشفيع ان ياخذ
منزلا واحدا قالوا ان
طلب الشفعة بحكم
الشركة فى الطريق
لاياخذ البعض لانه
تفريق الصفقة من غير
ضرورة وان اراد
الشفعة بحكم الجوار
وجواره فى هذا المنزل
الذي يريد اخذه لاغير
كان له ذلك فالحا
صل انه اذا اشتري
عقارا في موضعين
اوبستانين اودارين فى
مواضع متفرقة فكانت
الصفقة متفرقة بان
اشتري كل دار بصفقة
على حدة والشفيع
شفيع لهما بدارين له
اوبدار واحدة فاراد ان
ياخذ بالشفعة احدهما
كان له ذلك وان
اشتراهما فى صفقة واحدة
فانكان الشفيع شفيعا لهما
جميعا ليس له ان
ياخذ بالشفعة احدهما
ولكن ياخذهما اويدع .
وانكان الشفيع شفيعا
لاحدهما والصفقة واحدة
اختلف الروايات فيه
عن ابيحنيفة رح في
آخر الروايات عنه وهو
قول ابى يوسف
و محمد رح فانه ياخذ
التى هوشفيعها خاصة

وهو كما لو اشترى دارا
وعبد اصفقة واحدة فان
الشفيع ياخذ الدار
بالشفعة دون العبد
هذا اذا كان
الشفيع شفيعا لاحدهما
فان كان شفيعا لهما جميعا
والصفقة واحدة فانه
ياخذ هما اويدع -

the house only and not the slave. This case applies when he is the pre-emptor in one of the houses only, but if he is the pre-emptor in both of them, and the transaction of sale is one, then he must pre-empt both of them or give up his right of pre-emption.

(۱۰۸) رجلان باعا
دارا مشتركة بينهما من
رجل لم يكن للشفيع
ان ياخذ البعض وان كان
البائع واحد والمشتري
اثنين فللشفيع ان ياخذ
حصة احدهما يعتبر
جانب المشتري لاجانب
البائع وروى الحسن
عن ابي حنيفة رح ان
البائع اذا كان اثنين
والمشترى واحدا كان
للشفيع ان ياخذ نصيب
احد البائعين قبل القبض
ولا ياخذ بعضه بعد القبض
وهذا قول ابيحنيفة رح
الاول امافي قوله الاخر
يعتبر جانب المشتري
على كل حال قبل
القبض وبعده سواء كان
المشتري اشتراه لنفسه
اوبغيره بالوكالة -

108. Two persons sell a house which was their joint property to a vendee. In this case the pre-emptor has no right to pre-empt a part of the house, but if there were a single vendor, and two vendees, then the pre emptor could pre-empt the share of one of the vendees, in short, in pre-empting parts regard should be had to the vendees and not to the vendors. Hasan reports from Imam Abu Hanifa that when there are two vendors, and there is only one vendee then the pre-emptor has a right to pre-empt the shares of either of them before possession has been delivered but cannot pre-empt after delivery of possession to the vendee. This is the first view of Imam Abu Hanifa, but his later view is to the effect that regard should be had to the vendee on all occasions whether possession has been taken or not, and whether he has purchased it for himself or for others as their agent.

(۱۰۹) رجل اشترى
دارين لرجلين فليس
للشفيع ان ياخذ نصيب

109. An agent purchases two houses for two persons. In this case the pre-emptor is not entitled to

احد الامرين وان اشترى رجلان دارا لرجل كان للشفيع ان ياخذ النصف ولو كان البائع اثنين والمشتري واحدا نطالب الشفيع نصيب احد البائعين لابطال شفعته بذلك وله ان ياخذها كلها مقسومة كانت اوغير مقسومة —

pre-empt the share of one of the persons for whom the houses were purchased. If two agents purchase a house for a person, then the pre-emptor is entitled to pre-empt half of the house; and if there are two vendors, and only one vendee, and the pre-emptor pre-empts the share of one of the vendors, then his right of pre-emption is not extinguished thereby, but he must pre-empt the whole of the house whether partitioned or not.

فصل في تسليم الشفعة والحيلة في ابطالها واسقاطها

Chapter on surrender of the right of pre-emption and of the devices to invalidate it.

(١١٠) رجل اشترى دارا بمائة دينار وقال للشفيع اشتريت هذه الدار بمائة دينار فسلم لي نصفها وادفع نصفها اليك فقال الشفيع نعم او قال فعلت ذلك يكون تسليما للشفعة وذكر هذه المسئلة في كتاب الشفعة وجعلها على ثلاثة اوجه اما ان سلم الشفعة بالدراهم اوببعض منها بعينها اوببعضها بغير عينها اوقال سلمت لك نصف الشفعة بمائة درهم بطلت شفعته في

110. A person purchased a house for *dirhams* 100, later on he stated to the pre-emptor that he purchased it for *dinars* 100. Thereafter he asked the pre-emptor to remit or surrender one-half of the house in his favour, and that in return, he would deliver the other half of it to him (the pre-emptor). If the pre-emptor consents or says that he would act upon it, then he would be considered to have surrendered his right of pre-emption. This problem has been discussed in the book of pre-emption as having, three aspects. If he surrenders his right of pre-emption for *dirhams* whether in lieu of an

الكل وان قال سلمت
لك الشفعة فى نصف
الدار ففيه روايتان فى
رواية تبطل الشفعة فى
الكل وفى رواية لا تبطل
وذكر فى الجامع ما يدل
على ان تسليم الشفعة
فى البعض لايبطل
شفعته فى الكل وان
صالح الشفيع من الشفعة
على دراهم بطلت
شفعته ولايجب المال -
وان صالح على البعض
المعين من الدار صح
الصلح ويكون الشفيع
نصف الدار ويبقى
النصف المشتري -

ascertained or unascertained, part of the house or he says that he has surrendered half of the right of pre-emption in favour of the vendee for *dirhams* 100/, then his right of pre-emption is invalidated in the whole of the house, but if he declined to pre-empt half of the house, then there are two views according to one his right of pre-emption is annulled in the whole of the house, and according to the other it is not invalidated in the whole. According to the *Jamai* it seems that the surrender of the right in part of some property does not amount to the surrender of the whole of the property.* If the pre-emptor compounds his right of pre-emption for *dirhams*, then his right of pre-emption is invalidated, and the vendee would not be required to pay anything; but if he compounds his right in lieu of an ascertained part of the house, then the composition is lawful, and he would be entitled to take half of the house, and the other half would remain with the vendee.

(١١١) ولو ان الشفيع
قال المشتري وقد
اشتري الدار لغيره بالو

111. If the pre-emptor says to the agent who buys the house for the principal that he has surrendered

---

* The same view is found in the Fataw-i-Alamgiri, but under the Anglo-Muhammadan Law in such a case the right of pre-emption would be invalidated and *vide* Secs. 18 and 19 p. 20.

كالة سلمت شفعتها اوسلمت الشفعة لك اوقال ذلك للبائع والدار فى يدالبائع كان تسليما للشفعة ولوقال البائع بعد ماسلم الدار الى المشتري سلمت الشفعة لك صح استحسانا ولو قال سلمت الشفعة بسببك ولاجلك صح تسليمه قياسا واستحسانا -

his right of pre-emption in the house or he surrenders it for him (the agent) or he says the same to the vendor when the house is still in his possession then in all these cases, his right of pre-emption would be invalidated, but if the pre-emptor says to the vendor when the possession of the house was with the vendee, that he has surrendered his right of pre-emption in his favour, then according to the doctrine of *istehsan*, his surrender would be valid. If in the same case, the pre-emptor had said to the vendor that he surrendered his right for his sake, then according to the doctrines of *istehsan* and *qias*, his surrender is valid.

(١١٢) وان قال للوكيل بعد ماادفع الدار الى الموكل سلمت لك الشفعة صح استحسانا ولو اشتري دارا بالوكالة لغيره فقال اجنبى للشفيع سلم شفعة هذه الدار للموكل فقال الشفيع سلمتها لك اواعرضت عنها لك صح تسليمها قياسا واستحسانا ولو قال الشفيع لاجنبى ابتداء سلمت شفعة هذه الدار لك اوقال اعرضت عنهالك لايصح تسليمه ولايبطل شفعته قياسا

112. If the pre-emptor says to the agent, after he has delivered the house to the principal, that he has surrendered his right in his (agent's) favour, then according to *istehsan* it is valid. If the agent purchases a house for his principal and a stranger says to the pre-emptor to surrender his right of pre-emption in favour of the principal, and thereupon the pre-emptor surrenders his right to the stranger, then both according to *qias* and *istehsan* his right is invalidated. But if the pre-emptor of his own accord and without the stranger's request surrenders his right of pre-emption of the house in his (stranger's) favour or says

استحسانا ولو قال لاجنبي سلمت الشفعة للموكل اوقال وهبتها للموكل اوقال اعرضت عنها للموكل لاجلك وشفعتك صح تسليمه للامر وتبطل شفعته -

that he would abstain from enforcing his right, then according to *qias* and *istehsan*, his right is not invalidated; but if he says to the stranger that he surrenders his right in favour of the principal, or grants it as a gift to him or he says, that he does this for the stranger's sake, then his surrender is valid and his right is invalidated.

(١١٣) واوصالح الاجنبي الشفيع من شفعته على دراهم معلومة كان تسليما ولايجب المال لانه اوصالح المشتري من الشفعة على مال بطلت شفعته ولايجب المال وهو بمنزلة ماإذا صالح الكفيل النفس الطالب على مال لايجب المال وهل يبرأعن الكفالة في رواية ابي حفص رح يبرأ ولا يبرء في رواية ابي سليمان رح - ولو ان اجنبيا قال للشفيع اصالحك على كذا من الدارهم على ان تسلم الشفعة ولم يقل لي فقبل الشفيع لايجب المال على الاجنبي ولايبطل شفعته ولوقال الشفيع للبائع سلمت لك بيعك اوقال للمشتري

113. If the pre-emptor compounds his right of pre-emption with a stranger for some definite sum of *dirhams*, then his right of pre-emption is invalidated, and the stranger would not be required to pay the money, because if the vendee had made a compromise with the pre-emptor for a particular sum, then the pre-emptor's right would have been invalidated, and the vendee would not have to pay the amount, and this case resembles that of a surety who, when he makes a compromise with the creditor for a certain sum, is not legally bound to pay anything, but it is disputed whether he is freed from the suretyship. According to Abu Hafs, suretyship is discharged, but according to Abu Sulaiman it is not discharged. If the stranger says to the pre-emptor that he wishes to make a compromise with him for a certain sum of *dirhams* and he should surrender his right of pre-emption, and he (the stranger) omitted to ask him to

سلمت لک شراءک
بطلت شفعته وان قال
لاجنبی سلمت لک
شراء هذه الدار لم یکن
ذلک تسلیما ولا تبطل
شفعته -

surrender it in his favour, and thereupon the pre-emptor consents, then the stranger is under no obligation to pay the amount and the right of the pre-emptor, is invalidated. If the pre-emptor says to the vendor, "I submit to the sale for your sake," or he says to the vendee, "I submit to the purchase for your sake" then his right of pre-emption is invalidated, but if he says to the stranger, "I submit to the purchase of the house by you," then it is no surrender of the right (in favour of the vendee) and his right of pre-emption is not invalidated.

(۱۱۴) وان قال
الشفیع للمشتري سلمت
هذه الدار لک اوشفعة
هذه الدار لک ان
کنت اشتریتها لنفسک
وقد کان المشتري
اشتراها لغیره لایبطل
شفعته لانه علق التسلیم
بالشرط وتسلیم الشفعة
إسقاط يحتمل التعليق
والمعلق بالشرط لاینزل
عند عدم الشرط
ولو ان الشفیع
قال للمشتري ولم لی
نصف الدار بالشفعة
فابی المشتري لایبطل
شفعته هوالصحیح وکذا
لوقال الشفیع انا
شفیع هذه الدار سلم
لی نصفها بالشفعة فاسلم
لک النصف الباقی

114. If the pre-emptor says to the vendee, "I surrender this house to you, or I surrender the right of pre-emption of the house to you, provided you have purchased it for yourself," and if the vendee had bought it for another, then the pre-emptor's right of pre-emption is not invalidated, because he had surrendered his right with a condition, and the surrender is not incomplete unless the condition is fulfilled. If the pre-emptor asks the vendee to deliver to him half of the house by way of pre-emption, and he refused it, then the correct view is that his right of pre-emption is not invalidated. And similarly if the pre-emptor says to the vendee, "I am the pre-emptor, and so deliver to me half of the house in pre-emption, and then I shall leave the other half for you," and the vendee refuses, then his

فابى المشتري لايبطل شفعته —

right of pre-emption is not invalidated.

(۱۱۵) ولو ان البائع والمشتري قالا للشفيع ابرئنا عن كل خصومة لك قبلنا ففعل وهو لايعلم ثبوت الشفعة بطلت شفعته قضاء ولاتبطل فيما بينه وبين الله تعالى وهو كرجل قال لغيره اجعلنى فى حل ففعل ولم يعلم بماله قبله فى القضاء يبرأ عماله عليه ولايبرأ فيما بينه وبين الله تعالى —

115. If the vendor and the vendee ask the pre-emptor to discharge them from all liabilities of litigation, and the pre-emptor accepts their proposal while he has no knowledge of the existence of his right of pre-emption, then his right is legally invalidated, but it is not invalidated morally. Similarly if a person requests another to discharge him from all liabilities which he has against him, and the person requested does not know what his rights are against the person requesting, and he discharges him from all liabilities, then it would be considered before the Court as a valid discharge from all obligations, but before God his liabilities are not discharged.

(۱۱۶) ولو ان رجلا اوصى بداره لرجل لم يعلم به الموصى له ومات الموصى فبيعت دار بجنب دار الوصية ثم قبل الموصى له الوصية فالشفعة للموصى له فى الدار الثانية لم يملك الوصية قبل القبول فلايكون جاالدار الثانية ولو ان الموصى له مات قبل ان يعلم بالوصية ثم بيعت الدار الثانية بجنبها فادعى ورثة الموصى له الشفعة فى الدار الثانية كان

116. If a person leaves by will a house to some other person and of which that person is ignorant, thereafter the testator dies, and in the meanwhile some property adjacent to the bequeathed house is sold, and afterwards the legatee accepts the bequest, then the legatee has no right of pre-emption in the property sold, because he did not become owner before the acceptance of the legacy, that is, before the property in question was sold, consequently he cannot be regarded at that time as the neighbour to the property sold. If the legatee died before he knew of the will, thereafter the property adjacent

لهم ذلك لان موت
الموصى له قبل القبول
يكون قبول للوصية
فصارت الوصية ميراثا
عنه لورثته فاذا ثبت
الملك للورثة تحقق
لهم سبب الشفعة
وهو الجوار –

to the legacy is sold, and his successors claim the right of pre-emption in it, then they can do so, because the death of the legatee before his acceptance is equivalent to the acceptance of the legacy, and so it passes to his successors provided they prove themselves to be his heirs, and in this way they establish themselves as neighbours to the property sold.

(١١٧) واما الحيل
فی ابطال الشفعة ذكر
الخصاف رح فيه منها
مايكون تزهيدا عن طلب
الشفعة ومنها مايكون
ابطالا اما مايكون ابطالا
فمنها ان يهب البائع
الدار للمشتري ويشهد
على الهبة والمشتري
يهب الثمن للبائع
ويشهد عليها فلايثبت
الشفعة اذا لم يكن
الهبة بشرط العوض الا
ان هذه الحيلة
لايملكها بعض الناس
لانها تبرع ومن الناس
من لايملك التبرع
كالاب والوصی وغيرهما
ومنها ان يصدق
بالدار على انسان
ثم المشتري يتصدق
بمثل الثمن على البائع
فهی والهبة سواء الا ان

117. As regards the devices to be employed for the purpose of invalidating the right of pre-emption, Khisaf states that some of them are such because of which the pre-emptor is disinclined to pre-empt while others are such that they invalidate the right of pre-emption. Among various devices which invalidate the right of pre-emption—one of them is that the vendor grants a house as a gift to the vendee, and invokes witnesses on it, thereafter the vendee in return makes a gift of the price to the vendor and invokes witnesses on it, then nobody is entitled to pre-empt the house unless the gift was made with a condition of return. But this device cannot be practised by every one, because a gift is *tabarra'*, gratituous, pious and voluntary transfer and some people, such as the father of a minor or an executor, have no right to make it.[1] Another device is that the vendor gives away a house in *sadqa*,

---

[1] That is as regards the property of the minor and the testator respectively.

في الهبة للاجنبي يملك الرجوع وفي الصدقة لا يملك -

charity, to some person, and the vendee then gives away the price to the vendor in *sadqa*. This device resembles that of gift except that a gift to a stranger can be revoked but the *sadqa*, charity, cannot be withdrawn.

(١١٨) ومنها ان يهب جزء شائعا من الدار ثم يترافعان الى القاضي الذي يري هبة المشاع فيها . يحتمل القسمة فيحكم بجواز الهبة ثم يبيع بقية الدار منه فيكون الموهوب له مقدما على الجار ومنها ان يهب الدار بشرط العوض الا ان هذا على الرواية التي لا يثبت الشفعة في الهبة بشرط العوض اما في الروايات الظاهرة تثبت الشفعة في الهبة بشرط العوض فان اراد ان لا يأخذ الشفيع في ظاهر الروايات ينبغي ان يأخذ الموهوب له الدار الاجزأ منها ويأخذ الواهب كل العوض الا دانقا فلا يثبت الشفعة للشفيع فان في الهبة بشرط العوض قالوا انما يثبت الملك للموهوب له اذا قبض الكل اما اذا لم يقبض الكل لا يثبت

118. Another device is that the vendor gifts away an unascertained part of his house to the vendee, and brings the suit before the *Kazi* who grants decrees concerning properties capable of partition so that he may declare such a gift lawful, the object is to make the vendee possess a superior right to the neighbour for he becomes a partner in the house, and afterwards the vendor sells the rest of the house to the vendee. Another device is that a house is granted to some person as a gift with a condition of return, but this is according to the narration which does not establish pre-emption in a gift made with a condition of return, for according to the *Zahir Riwayat* a gift with a condition of return is subject to pre-emption. If the donor desires that the pre-emptor should be disentitled according to the *Zahir Riwayat* also, then the donee should purchase the whole of the house except a breadth of a cubit, and the donor should receive the whole of the return but a pice. If this is done, then the pre-emptor would be precluded from pre-empting the house, for the juristshold that, in a gift with a condition

له الملك ولاينقطع
حق الواهب ويكون
للوهب ان يرجع من
غير قضاء ولا رضاء يروي
ذلك عن محمد رح
نصا فيكون هذا كالبيع
بشرط الخيار للبائع
وثم لايثبت الشفعة
للشفيع بالقى حق
البائع هذا اذا كان
الموهوب شيأ يحتمل
القسمة فانكان لايحتمل
القسمة كا لبيت الصغير
والحانوت اذا وهب
منها جزءا معلوما شائعا
جاز عند الكل ولايكون
للجار ان ياخذ بالشفعة -

of return, the donee does not acquire ownership over the gift until he enters on its entire possession, and unless he acquires possession over the whole, his ownership is not established, and the donor's right over it would not cease, that is, he is entitled to revoke the gift even without the decree of the *Kazi*, and without mutual agreement. According to Imam Muhammed the above-mentioned gift corresponds to the sale in which the vendor has an option and as long as this right of the vendor continues, the right of the pre-emptor to pre-empt the property cannot be established. This effect operates when the donor gifts a property capable of division, but if he gifts an unascertained portion of some property incapable of division, such as a very small apartment or a shop, then according to all jurists it is lawful, and the neighbour is not entitled topre-empt it.

(119) ومنها ان
يشتري البناء اولا في
صفقة ثم يشتري العرصة
بثمن غال فلايثبت
الشفعة في البناء لانة
نقلي ولايرغب الشفيع
في اخذ العرصة بثمن
غال فكان تزهيدا
وكذا لووهب البناء
باصله ثم يشتري
العرصة بثمن غال
كذلك في الكروم

119. One device is that the vendee should first buy the structure of a building by one transaction of sale, and then buys the land on which the building is situated at very high price, the result is that the structure is transformed into moveable property which is not a fit subject of pre-emption, and the pre-emptor would not be inclined to pre-empt the land, because of high price, though his right of pre-emption subsists. Another device is that the

والاراضى وفى هذه الفصول اذا اراد الشفيع ان يحلف البائع او المشتري بالله مافعل هذا فرارا عن الشفعة ان اراد تحليف البائع ليس له ذلك لان نكوله لايكون حجة على المشتري وان اراد تحليف المشتري فكذلك لانه يدعى عليه شيئا لواقربه لايصح –

owner of the structure grants it as a gift to a person and then sells the land to him at a high price, and the same may be brought about as regards agricultural lands. In these cases of devices if the pre-emptor intends to demand an oath from the vendor or the vendee as to the fact that they did not practise any device with a view to invalidate the right of the pre-emptor, then it is not open for him to demand an oath from either of them because if the vendor refuses to take an oath, then his refusal does not operate as estoppel against the vendee, and similarly if he intends to demand an oath from the vendee, and he admits his claim, then the admission is of no consequence.

(١٢٠) ومن الحيلة ان يشتري سهما معلوما بثمن غال فى صفقة ثم يشتري الباقى بثمن يسير فلايرغب الشفيع فيما باع اولا لكثرة ثمنه ولايملك اخذ الباقى لان المشتري يصير شريكا فيكون مقدما على الجار ومنها ان يشتري الدار بثمن غال ثم ياخذ البائع بذلك الثمن بدلا آخر فلايرغب الشفيع ان ياخذ الدار بالثمن لكثرة ولايكون له ان

120. Another device is that a vendee purchases an ascertained part of a house at a very high price by a contract of sale, and afterwards purchases the remaining part at a low price, so that as regards the first sale the pre-emptor is disinclined to pre-empt the subject of sale by reason of its being expensive, and as regards the latter sale, he will not be entitled to pre-empt it because the vendee has now become a partner in the property by virtue of the first transaction therefore he has a superior right to that of the neighbour. Another device is that the vendee purchases a house at a high

يأخذها بالبدل الثاني
لان الثاني بدل عن
الثمن لاعن الدار –

price, and pays the vendor something in lieu of the price, and the pre-emptor is disinclined to pre-empt the house at such a high price, moreover it is not open for him to pre-empt the house on paying the value of the other thing instead of the price because it was not given in exchange for the house but in lieu of the sale-consideration.

(١٢١) وذكر الخصاف
رح حيلة لم يروها عن
محمد رح وهي ان
يدعى ان الدار لابن
صغير له في يد هذا
الرجل ثم ان المدعى
يصالح الذي في يديه
الدار على ان يدفع
اليه مائة دينار ولايقول
انها من مال ابنه على
ان يسلم الذي في
يديه الدار فيجوز
ولاشفعة فيها لان الاب
لايأخذ الدار بطريق
المعاوضة فيقع الملك
للابن دون الاب الا ان
هذا كذب فان اراد
ابطال الشفعة على وجه
لايكون كذبا يامر الاب
مملوكاله ان يشترى
الدار من صاحبها لابن
صغير لمولاه بالثمن الذي
اتفقا عليه فيشترى
المملوك شراء ثم ان
المولى يدعى ان الدار
لابنه الصغير ولايدعى

121. Khisaf mentions another device which has not been reported from Imam Muhammed. It is this that the owner of the house is sued on the allegation that the house belongs to the infant son of the plaintiff. Then the plaintiff compromises with the defendant who has the possession of the house to the effect that he would transfer it to him on payment of *dinars* 100, but he should not declare that the *dinars* were his infant son's money. By this device the pre-emptor is precluded from enforcing his right of pre-emption in the house, because the father of the infant son does not take the house by way of return, and consequently it cannot be considered as his property for it is the property of the son. But this device is wanting in truthfulness. And if the father wants to invalidate the right of pre-emption wishing at the same time that he should not speak falsehood, then the device should be employed in this way, the vendor should delegate his slave to purchase the

الشراء فيكون صادقا الا
ان هذا لا يخلو عن نوع
شبهة لان الملك انما
يثبت للابن بالسبب فاذا
ادعى الاب ملكا مطلقا
كان مدعيا غير ذلك
الملك لان الملك
المطلق اقوى من
الملك بالسبب على
ماعرف ان القضاء
بالملك المطلق قضاء
بالزوائد وفي القضاء
بالملك بسبب لايدخل
الزوائد والشهود اذا
تحملوا الشهادة على
الملك بسبب فاذا شهد
وابالملك المطلق كانت
شهادتهم بالاصل
والزيادة — واختلف
المشائخ رح ان الشاهد
اذا اتحمل الشهادة
على الملك بسبب ثم
ان البائع غصب المبيع
من المشتري فجاء
المشتري بالشهود امرهم
ان يشهدوا له بالملك
المطلق قال بعضهم
يجوزلهم ان يشهدوا
بالملك المطلق وقال
بعضهم لايجوز وكذا اذا
تحملوا الشهادة على
الدين بسبب هل يباح
لهم ان يشهدو
اعلى الدين مطلقا
هوعلى هذاالخلاف ايضا

house on behalf of his master's infant son and then the master should bring a suit claiming that the house in question is the property of his son and should not declare anything about the purchase of the same. In this case his declaration is true, but it is not free from doubt, for the property passess legally to the son while the father, since he is the plaintiff claims it as his own property; consequently his assertion is wrong because *milk mutlaq*, absolute ownership, is better than ownership *milk bis sabab*. A decree of absolute ownership means *qaza bizzawaid*, it empowers higher rights of ownership while the decree empowering to hold the property as *milk bis sabab*, does not include *zawaid*. Thus if the witnesses had the knowledge of *milk bis sabab* but they deposed it as *milk mutlaq* then their depositions would be against facts, But if they were aware of *milk bis sabab*, thereafter the vendor as against the vendee usurped the subject of sale, now the vendee tenders evidence testifying *milk mutlaq* absolute ownership, then the jurists differ according to some the witnesses may depose as to *milk mutlaq*, while according to others it is not proper to do so. Similarly if the witnesses were aware of debt, *dain bis sabab*, then according to some jurists it is proper to depose that the debt was

الخصاف رح يقول بالجواز ومن جملة الحيل ان يقر البائع بجزء معلوم من الدار المشتري ثم يبيع الباقي منه الا ان هذا يكون على الاختلاف ايضا فانهم اختلفوا ان الانسان اذا اقر لغيره بعين هل يثبت الملك المقر له بالاقرار قال بعضهم لايثبت لان الاقرار ليس من اسباب الملك ولهذا لايصح من العبد الماذون ولوكان الاقرار من اسباب الملك كان الاقرار تمليكا بغيرعوض والعبد الماذون لايملك ذاك -

absolute *dain mutlaq*, while according to others it is not, Khisaf supports the former view.* Among various devices one is that the vendor may admit that a particular portion of the house belongs to the vendee, and then sell the rest to him. But this view also is susceptible of difference of opinion because if a persons admits of a particular thing in favour of another, then some jurists hold that by this admission, that person's ownership is proved, while others say that it is not; for an admission is not a cause of ownership; hence if a slave, who is authorised by the master to buy and sell on his behalf, makes an *iqrar* agrees to sell, then his *iqrar* is binding, but by itself it cannot establish ownership, for if it were so, ownership would be perfected without consideration, and the slave is not authorised to commit himself thus.

(۱۲۲) ومن الحيل ان يوكل المشتري رجلا بالشراء فيشتري الوكيل ويغيب ولايكون الموكل خصما للشفيع الا ان هذا على قول محمد رح اما على قول ابي يوسف رح يكون الموكل خصما للشفيع ليطالب منه الشفعة فانه

122. Another device is that the vendee may appoint an agent on his behalf to purchase the house, and after the sale the agent should absent himself, so that now the pre-emptor cannot sue the principal. But this device is possible according to Imam Muhammad, whereas according to Imam Abu Yusuf it is not, for Abu Yusuf maintains that the pre-emptor can sue the principal. It

* These passages are not quite clear.

ذكر في الماذون اذا
اشتري الرجل دار
اوباع من اخر وغاب
المشترى الاول ثم جاء
الشفيع واراد ان ياخذ
بالبيع الاول على قول
محمد رح لا يملك ذلك
وعلى قول ابى يوسف
رح يملك ذلك -

is mentioned in the *Mazun* that if a person after having purchased a house sells it to another, and thereafter absents himself, and the pre-emptor sues for pre-emption on the first sale, then Imam Muhammad holds that he cannot do so, whereas according to Imam Abu Yusuf, he can sue.

(١٢٣) وعلى هذا
الخلاف العبد الماذون
المديون اذا باعه
المولى بغير اذن الغرماء
فغاب فحضر الغرماء
لا خصومة لهم مع
المشتري في قول
محمد رح وعلى قول
ابى يوسف رح للغرماء
ان يخاصمو المشتري -
ومن الحيلة بالشفعة ان
يواجر المشتري من البائع
ثوبا ليلبس يوما الى
الليل بجزء من مائة
جزء من الدار فمضى
اليوم ثم يبيع بقية
الدار من صاحب
الثوب فلا يكون الشفعة
للشفيع في الجزء
الاول لان صاحب
الثوب ملك الجزء
بالمنفعة واما في بقية
الدار فان صاحب الثوب
صار شريكا في الدار فكان

123. If a slave is indebted to some persons, and his owner sells the slave without their consent and thereafter he (the slave) runs away, then according to Imam Muhammad the creditors cannot sue the vendee to recover their debts, whereas according to Imam Abu Yusuf, they can sue the vendee to recover their debts. Another device is that the vendee may settle with the vendor to give him a piece of cloth to put on from morning to night, and as a hire to take one-hundreth part of his house, and after the day is over he should sell the rest of the house to the vendor. In this case no pre-emption will be allowed.[1] The pre-emptor is not entitled to pre-empt the first part of the house because the owner of the cloth has acquired property in it by reason of (*munfat*) profit, and in the rest of the house because now the owner of the cloth is the partner of the parts sold. Another device is that

[1] This is a contract of exchange and the pre-emptor seeks Shuf'a against the vendor.

مقدما علي صاحب
الجار ومنها ان
يستاجر صاحب الدار
الذي يريد شراء الدار
بعشر الدار علي ان
يسقيه فاذاسقاه في
ذلك المجلس اوفي
غيره يملك عشر الدار
فلايكون الشفيع حق
الشفعة وهو اولي من
الجار جعل الاجرة ههنا
بمنزلة المهر وفي
المبسوط جعل الاجرة
بمنزلة المبيع فانه قال
لوكانت الاجرة عبدا
فباعه قبل القبض
لايجوز ولواستحق
العبد الذي هواجر
الدار بطل العقد
والخصاف رح جعل
الاجرة بمنزلة المهر .

the owner of the house may ask the vendee to give him a drink of water and in return of which he promises to give him one-tenth part of his house. If the vendee gives him a drink of water in the meeting or later on then he would become owner of the one-tenth part of the house, and by reason of partnership in the house, he would be preferred to any pre-emptor who demands pre-emption by reason of neighbourhood. Here *ujrat*, the reward (of labour) can be compared to a dower, but in the Mabsut, it is considered to be in lieu of the property-sold, hence if the *ujrat* is a slave, and the person entitled to the *ujrat* sells him before he has got possession of him, then such a sale would be unlawful, and if anybody claims a right in the *ujrat*, then the contract would become void. Khisaf compares *ujrat* to dower.

(١٢٤) ومن الحيلة
انه اذا اراد ان يبيع
الدار بعشرة الاف درهم
يبيعها بعشرين الفا ثم
يقبض تسعة الاف
وخمسمائة ويقبض
بالباقي عشرة دنانير
واقل اواكثر لواراد
الشفيع ان ياخذها
بعشرين الفا فلايرغب
في الشفعة ولواستحقت
الدار علي المشتري
لايرجع المشتري

124. Another device is that when a person intends to sell a house for *dirhams* 10,000/-, he may arrange to sell it for 20,000/-, and may actually take 9,500/- *dirhams*, and after taking ten or twenty *dinars* in lieu of the rest of the sale-consideration deliver the house to the vendee. In this case if the pre-emptor would demand pre-emption, he would be obliged to pre-empt it for *dirhams* 20,000/-, and hence he would be disinclined to do so. But if anybody claims a right in the house afterwards, and the

بعشرين الفا وانما يرجع بما اعطاه لانه اذا استحقت الدار يظهر انه لم يكن عليه ثمن الدار فيبطل الصرف كما لو باع الدينار بالدراهم التى المشتري على البائع ثم تصادقا انه لم يكن له عليه دين فانه يبطل الصرف -

vendee is obliged to return the house, then he is not entitled to demand 20,000/- *dirhams* from the vendor, but can demand only the amount he has actually paid; for a right having been claimed by another it became evident that the vendee was not under an obligation to pay the price of the house, and the rest of the consideration *dirhams* 10,500/- has been invalidated by the payment of *dinars*; for example if a person owes some rupees to another person, and the debtor gives few sovereigns to the creditor instead of the rupees, and they compromise among themselves that the debt is paid up, then the payment in sovereigns is deemed to cancel the debt.

(١٢٥) ومن حيلة ابطال الشفعة ان يقول المشتري للشفيع انى اشتريت الدار من فلان بكذا فانا ابيعها منك فاشتر ويقول زدنى فى الثمن كذا وخذ او يقول عاوضها لى بدار اخرى او يقول انى اوليكها فان احببت ان اوليكها بالثمن الذي اشتريتها وليتكها فقال الشفيع توليتها فانه يبطل الشفعة - وكذا لو بعث المشتري الى الشفيع رجلا يقول للشفيع ذلك

125. Another device to invalidate pre-emption is that the vendee informs the pre-emptor that he bought the house from such and such person and for so much, and that he intends to sell it to him or he may increase the price, and ask him to take it at the increased sum, or he may ask him to deliver to him another house in exchange of this particular one, or he may ask him to pay him the same price as he has paid, and if the pre-emptor accepts such proposals, then his right of pre-emption is invalidated. If the vendee sends a word through a messenger to the pre-emptor, and he tells him that a particular

فقال الرجل المبعوث
للشفيع ان فلانا
اشتري هذه الدار
بكذا وهو يقول لك
ان يجبت ان اوليكها
بما اشتريتها به وليتكها
فقال الشفيع نعم وليتها
فانه تبطل الشفعة —
ولو بعث المشتري
الى الشفيع رجلا
فقال للشفيع قد كنت
اشتريت من فلان
يعنى البائع هذه
الدار قبل شراء هذا
الرجل فقال الشفيع
نعم بطلت الشفعة لان
الشفيع اقران شراء
هذا المشتري لم يصح
فلم يثبت به الشفعة
وكذا لوقال ذلك
الرجل للشفيع هذه
الدار لك ولم يكن
لفلان البائع فقال
الشفيع نعم بطلت
شفعة لانه لما ادعى
الملك لنفسه فقد
اقربانه لاشفعة له —

(١٢٦) ولوقال
المشتري للشفيع انى
اشتريت هذه الدار
بمائة دينار فان اجبت
ان احطك من ثمنها
عشرة دينار فقال نعم
بطلت شفعته قالو انما
يبطل شفعته فى هذه

person has purchased the house for so much money, and that he has asked him to convey this information and he wants to sell it for the same price as he has purchased, and that if you so desire you may purchase it, now if the pre-emptor accepts the offer then his right of pre-emption is invalidated. If the vendee sends a person to the pre-emptor who tells him, "I bought the house from the vendor before this vendee purchased the same from him," and the pre-emptor said "yes," then his right would be annulled, because he thereby admitted that the vendee's purchase was unlawful, and now when the sale is invalid, no right of pre-emption can arise in it. Similarly if the messenger says to the pre-emptor that particular house belongs to the pre-emptor himself, and not to the vendor, and the pre-emptor responds to it, saying, "yes" then his right of pre-emption would be invalidated because when he claims the house to be his own property, then no right of pre-emption arises.

126. If the vendee said to the pre-emptor, "I purchased this house for *dinars* 100/- and if you like, I am ready to remit *dinars* 10/- to you from the price," now if the pre-emptor consents to this, then his right of pre-emption would be invalidated. The jurists say that his right is invalidated in the case only

الصورة • اذا قال احط
عنك من ثمنها عشرة
دنانير وابيعها منك
بتسعين دينار اما
بدون هذه الزيادة
لا يبطل شفعته -

when the vendee says to the pre-emptor that he is remitting *dinars* 10/- from the price to the pre-emptor, and he is ready to sell the house to him for *dinars* 90/-, and if he does not state all this, the right of pre-emption is not invalidated.

١٢٧ ولو اشترى
دارا وطلب الشفيع
الشفعة فصالح المشتري
من ذلك على بيت
معين من الدار يدفعه
اليه بحصته من
الثمن ذكرنا انه لايجوز
لان حصته من الثمن
ليست بمعلوم فان اراد
ان يسلم البيت الى
الشفيع ويبقى مابقى
من الدار للمشتري
يشتري رجل اجنبي
هذا البيت للشفيع
بامره ثم ان الشفيع
يسلم الشفعة فيما بقى
من الدار فيحصل
الغرض لكل واحد
منهما سلم البيت
للشفيع ويثبت الدار
للمشتري -

127. If a person purchases a mansion and the pre-emptor demands pre-emption in it, thereafter the vendee compromises with the pre-emptor on the condition that he (vendee) would give a particular house of the mansion to him, and the pre-emptor shall pay him as much price as would be apportioned to it with due regard to the whole mansion and its price, that is the price of the mansion would be divided between various houses and the pre-emptor would pay him as much as it is apportioned to this particular house. Our jurists hold that it is unlawful, because the portion of the price is unascertained; but if the vendee intends to retain the mansion, and wishes to give away the house to the pre-emptor, then he must proceed in this way: that is, with the permission of the pre-emptor, he should appoint a stranger to purchase the house on behalf of the pre-emptor, and the pre-emptor should give up his right in the rest of the mansion, thus their object would be achieved, that is the pre-emptor would own the house, and the vendee the rest of the mansion.

(١٢٨) اذا مات الشفيع بعدما قضى القاضى له بالشفعة قبل ان يقبض الدار وقبل ان ينقد الثمن كانت الدار لورثة الشفيع لان قضاء القاضى بالشفعة بمنزلة البيع – ولومات الشفيع بعدما اشتري الدار كانت ميراثا لورثة -

128. If the Kazi has decreed pre-emption to the pre-emptor, but he dies before taking possession of the house, and paying the price, then this house would be given over to his heirs, because the decree of the Kazi is equivalent to sale. Similarly if the pre-emptor dies after purchasing the house then his heirs would inherit it.

(١٢٩) ولو قضى القاضى بالشفعة للشفيع وطلب المشتري من الشفيع ان يريد الدار على المشتري بزيادة فى الثمن والزيادة من جنس الثمن اومن غير جنسه يصير الدار للمشتري بالثمن الاول ويبطل الزيادة لان رد الدار على المشتري يكون بمنزلة الاقالة والاقالة انما تكون بالثمن الاول ولا يصح فيها الزيادة وكذا لوطلب المشتري من الشفيع بعد ماقضى القاضى له بالشفعة ان يريد الدار على البائع بزيادة فى الثمن ففعل كانت اقالة والاقالة كما تكون بين البائع والمشتري تتحقق بين البائع والشفيع لان الشفيع

129. If the Kazi has decreed pre-emption in favour of the pre-emptor, and then the vendee requests the pre-emptor to hand over to him the house in lieu of an higher price which he is willing to pay, and the pre-emptor accepts the proposal and returns the house to him, then the vendee would be entitled to take the house for the original price, and the increase is deemed to be void, it is immaterial whether the increase in the price relates to things belonging to a class of similars to the sale-consideration or to a class of dis-similars; for the returning of the house *iqala* is subject to the original price and the increase is unlawful. And similarly if after the decree of the Kazi in favour of the pre-emptor, the vendee asks the pre-emptor to return the house to the vendor on payment of an increased price, and he returns the house to him, then also the increase in the price would

بعد ما قضى القاضي له قائم مقام المشتري ويصير المشتري كالوكيل للشفيع فيصح اقالة الشفيع مع البائع ويكون له حق الحبس الى ان يستوفى الثمن -

be invalidated, for this return is also an *iqala* transfer, and the *iqala* can be effected as perfectly and lawfully between the pre-emptor and the vendor, as it can be between the vendor and the vendee; for as soon as the Kazi decreed pre-emption in favour of the pre-emptor, he stepped into the position of a vendee, who is deemed to be as if the pre-emptors' agent, and hence the *iqala* by the pre-emptor to the vendor is lawful, and until he receives the price, he is entitled to retain the property.

(١٣٠) ذكر محمد رح في الاصل الحيلة في اسقاط الشفعة ولم يذكر الكراهية فالوا على قول ابي يوسف رحمه الله لا يكره وعلى قول محمد رح يكره وهذا بمنزلة الحيلة لمنع وجوب الزكوة ومنع الاستبراء على قول ابي يوسف رح لا يكره - وقال بعض مشائخنا رح يكره الاحتيال لاسقاط الشفعة بعد الوجوب لانه احتيال لابطال حق واجب وقبل الوجوب ان كان الجار فاسقا يتاذى

130. Imam Muhammad has mentioned in the *asl*, devices by means of which the right of pre-emption is invalidated, and has said nothing whether he disliked its practice. The jurists say that Abu Yusuf approved of such devices but Imam Muhammad disapproved of them. Similarly the device which a person practises in order to avoid *zakat* [1] or that he might be excused from his debts *istibra* are not considered as *mukruh*, prohibitory by Imam Abu Yusuf. Some of our jurists hold that it is undesirable to practise a device in order to invalidate pre-emption after it has accrued in favour of the pre-emptor because it invalidates a right to which the pre-emptor is entitled, but if

[1] A special tax which is obligatory on all Muslims it is payable with respect to gold, silver and even *domestic animals.*

منه لاباس به وقال الشيخ الامام شمس الائمة السرخسي رح لاباس بالاحتيال لابطال حق الشفعة علي كل حال اما قبل وجوب الشفعة لاشك كما لوترك اكتساب المال لمنع وجوب الزكوة وبعد وجوب الشفعة لايكره الاحتيال أيض لانه احتيال لدفع الضرر عن نفسه لا للاضرار بالغير فظاهر ماذكرنا دليل علي هذا –

the neighbour (who is a pre-emptor) is a *fasiq*[1] and a *muzi*[2] there is nothing undesirable in practising such a device. Shaikh Imam Shamsul ima Surakhsi says that, in no case it is undesirable to employ device in order to invalidate the right of pre-emption. As regards devices being practised to invalidate pre-emption before a pre-emptor is entitled to it, it is clear that it is never undesirable, as for example, a person fearing *zakat* would be levied does not accumulate goods. It is not undesirable to employ device even after the right of pre-emption is vested in some person, because by so doing the author of device wants only to ward off the inconvenience, and does not intend thereby to cause injury to any person, this argument is based on what we have already mentioned.

---

1 A person who commits all sorts of sinful acts.

2 A person who habitually commits unjust and injurious acts.

THE TRADITIONS OF THE PROPHET ON PRE-EMPTION

الجامع الصحيح
للبخاري

From the Sáhih of Al-Bukhari—
Chapter on Pre-emption.

عن جابربن عبدالله
رض قال قضى النبي
بالشفعة في كل مال
لم يقسم فاذا وقعت
الحدود وصرفت الطرق
فلا شفعة

I. On the authority of Jabir, son of Abdullah, said he, " the Prophet has ordered for pre-emption in case of every such property as has not been divided. But when boundaries and passages have been marked out then there is no pre-emption."

عن عمروبن الشريد
قال وقفت على سعدبن ابى
وقاص فجاء المسوربن
مخرمة فوضع يده على
احدى منكبتي اذجاء
ابورافع مولى النبي
فقال ياسعدابتع مني
بيتي في دارک فقال سعد
والله ماابتاعهما فقال
المسور والله لتبتاعنهما فقال
سعد والله مازيدک على
اربعة الاف منجمة
اومقطعة قال ابو رافع
لقداعطيت بها خمسمائة
دينار ولو لااني سمعت
رسول الله يقول الجار احق
بسقبه ما اعطيتكها باربعة
الاف وانا اعطى بها

II. On the authority of Amr, son of Al-Sharid said he, " I was standing by Sa'd, son of Abu Waqqas, when there came Al-Misawar, son of Makhrama, and placed his hand on one of my shoulders." Then there came Abu Rafi, the servant of the Prophet, and said, " O Sa'd ! purchase from me the two houses that are next to your house." Sa'd said " by Allah I will not purchase them ". Al-Misawar said. " By Allah you shall have to purchase them " Sa'd Said, " by Allah I will give you 4000 dirhams and even that by instalments." Abu Rafi said, " I am already being paid 500 dinars for them, and if I had not heard the Prophet saying that the neighbour has the greatest right on account of his being near in proximity, I

خمسا ئية دينار فا عطا
ها اياه -

would not have given you these houses for 4000 dirhams particularly when I am certain of getting 500 dinars for them." Then Abu Rafi gave those houses to Sa'd.

عن ابی عمران قال
سمعت طلحة بن عبدالله
عن عایشة یالت قلت
یارسول الله ان لی
جارین فالی ایهما اهدی
قال الی ، اقربهما
منک بابا -

III. On the authority of Abu Imran said he, "I heard Talha, son of Abdullah" quoting 'Ayisha I said.' "O Prophet of God! I have two neighbours; to which of the two shall I sell the share first?" The Prophet said "to the one whose door is nearer to yours."

الصحیح لمسلم باب
الشفعة

From the Sahih of Muslim—Chapter on Pre-emption.

عن جابربن عبدالله
قال قال رسول الله من
کان له شریک فی ربعة
اونخل فلیس له ان یبیع
حتی یوذن شریکه فان
رضی اخذوان کره
ترک -

IV. On the authority of Jabir, son of Abdullah said he, "The Prophet said, 'Whosoever has a co-sharer in a house or palm-grove (garden) should not sell it till he has the permission of his co-sharer, who if he is willing to take it may pre-empt it but if he does not like (to take it) he should leave it."'

عن جابر قال قضی
رسول الله بالشفعة فی
کل شرکة لم تقسم ربعة
اوحائط لایحل له ان یبیع
حتی یوذن شریکه فان شاء
اخذدان شاء اخذو ان
شاء ترک فاذاباع ولم
یوذنه فهواحق به -

V. On the authority of Jabir said he, "The Prophet of Allah has ordained pre-emption in case of every such joint property as has not been divided, be it a house or an enclosed garden. It is not legal for him to sell it away till his co-sharer permits him to do so." If he (the co-sharer) wishes so he may take it or else if he so wishes he may give it up. But when the seller sells it without having obtained permission then the co-sharer is the fit person to pre-empt it."

عن ابن جريج ان ابا الزبير اخبره انه سمع جابر بن عبدالله يقول قال رسول الله الشفعة فى كل شرك فى ارض اوربع اوحائطا لايصلح ان يبيع حتى يعرض على شريكه فيا خذ اويدع فان ابى فشريكه احق به حتى يوذنه —

VI. On the authority of Ibn Jurayj; that Abu Zubayr informed him that he heard Jabir, son of Abdullah saying: "The Prophet of Allah has ordained pre-emption regarding every joint property (be it) a land or a house or a garden; and that it is not proper that one should sell it without having offered it to his co-sharer who may take it or leave it, but if he refuses (to take it) then he may be taken to have permitted sale of it."

جامع الترمذى باب الشفعة

From the Jamai of Tirmizi—Chapter on Pre-emption.

عن سمرة قال قال رسول الله صلى الله عليه وسلم جار الدار احق بالدار —

VII. On the authority of Samurah, said he, "The Prophet of Allah (peace be on him) said 'The neighbour of the house has the greatest right (to pre-empt) the house."'

عن جابر — قال قال رسول الله الجار احق بشفعة ينتظر به وان كان غائبا اذا كان طريقهما واحداً —

VIII. On the authority of Jabir, said he, "The Prophet of Allah said,'The neighbour has the greatest right of pre-emption. One should wait for him even though he is absent particularly when there is a common passage to both the properties."'

عن جابر بن عبدالله قال قال رسول الله اذا وقعت الحدود و صرفت الطرق فلا شفعة

IX. On the authority of Jabir, said he, "The Prophet of Allah said 'When the boundaries have been laid down and roads marked out then there is no pre-emption."'

عن ابن عباس — قال قال رسول الله الشريك شفيع والشفعة فى كل شي —

X. On the authority of Ibn 'Abbas, said he "The Prophet of Allah said 'The co-sharer has the right of pre-emption and pre-emption lies in everything."'

سنن ابی داؤد . باب الشفعة

From the Suran of Abu Dawud—Chapter on Pre-emption.

عن جابر قال قال رسول الله الشفعة فی کل شرک ربعة او حائط لا یصلح ان یبیع حتی یوذن شریکه فان باع فهو احق به حتی یوذنه -

XI. On the authority of Jabir, said he, " The Prophet of Allah said, ' Pre-emption applies to every kind of joint property whether it be a house or a garden. It is not proper for one to sell (his property) until his co-sharer has permitted him to do so, and if he should sell it then his co-sharer is the most rightful person (to pre-empt it).'"

عن جابر بن عبدالله قال انما جعل رسول الله الشفعة فی کل مال لم یقسم فاذا وقعت الحدود وصرفت الطرق فلا شفعة -

XII. On the authority of Jabir, son of Abdullah, said he, "The Prophet of Allah has made pre-emption applicable to every property that has not been divided. But when the boundaries and passages have been marked then there is no pre-emption."

عن ابی هریرة قال قال رسول الله اذا قسمت الارض وحدت فلا شفعة فیها -

XIII. On the authority of Abu Hurayra, said he, "The Prophet of Allah said, ' When the lands have been divided and its boundaries laid down then there is no pre-emption.'"

عن ابی رافع انه سمع النبی یقول الجار احق بسقبه -

XIV. On the authority of Abu Rafi : That he heard the Prophet to say, " That the neighbour is the most rightful person (to claim pre-emption) on account of his near proximity."

عن سمرة عن النبی قال جار الدار احق بدار الجار او الارض -

XV. On the authority of Samurah who quoted the Prophet to have said " The neighbour of the house has the greatest right to the house and the land of his own neighbour."

عن جابر بن عبدالله قال قال رسول الله الجار

XVI. On the authority of Jabir, son of Abdullah, said he, "The Prophet of Allah

احق لشفعة جاره ينتظر
بهاوان كان غائبا اذا كان
طريقهما واحداً -

said 'The neighbour has the greatest right of pre-emption to the property of his neighbour, and if he were absent his return should be waited for, particularly when there is a common passage to both the properties." '

سنن ابن ماجه ابواب
الشفعة

From the Suran. of Ibn Majah—Chapter on Pre-emption.

عن جابر - قال رسول
الله صلى الله عليه وسلم من
كانت له نخل اوارض فلا
يبيعها حتى يعرضها على
شريكه -

XVII. On the authority of Jabir, said he, "The Prophet of Allah (peace be on him) said, 'Whosoever has a palm-grove (garden) or land he should not sell it till he has offered it to his neighbour." '

عن ابن عباس عن
النبى صلى الله عليه وسلم
قال من كانت له ارض
فاراد بيعها فليعرضها على
جاره -

XVIII. On the authority of Ibn 'Abbas from the Prophet (peace be on him), said he, "Whosoever has a land and intends to sell it he should offer it to his neighbour."

عن جابر قال قال
رسول الله صلى الله عليه
وسلم الجار احق بشفعة
جاره ينتظر بهاوان كانت
غائبا اذا كان طريقهما
واحدا -

XIX. On the authority of Jabir, said he, "The Prophet of Allah (peace be upon him) said, 'The neighbour has the greatest right of pre-emption to the property of his own neighbour and if he were absent his return should be waited for, particularly when there is a common passage to both the properties." '

عن عمرو بن الشريد
عن ابى رافع ان النبى
صلى الله عليه وسلم قال
الجار احق بسقبه -

XX. On the authority of Amr bin Al-sharid from Abu Rafi; that the Prophet (peace be upon him) said, "The neighbour is the most rightful person (to claim pre-emption) owing to his proximity."

عن شريد بن سويد
قال قلت يارسول الله

XXI. On the authority of Sharid, son of Suwayd, said he, "I said to the Prophet,

ارض ليس فيها لاحد
قسم ولاشريک الاالجوار
قال الجار احق بسقبه

how about a land in which there is no co-sharer but there is a neighbour." He said, "The neighbour is the most rightful person (to pre-empt) owing to his near proximity

عن ابی هريرة ان
رسول الله صلی الله عليه
وسلم قضی بالشفعة فيما لم
يقسم فاذا وقعت الحدود
فلا شفعة —

XXII. On the authority of Abu Hurayra "The Prophet (peace be upon him) had ordained pre-emption for property that was not divided, but when the boundaries have been marked out then there is no pre-emption."

عن ابی رافع قال قال
رسول الله صلی الله عليه
و سلم الشريک احق
بسقبه ماكان —

XXIII. On the authority of Abu Rafi, said he, "The Prophet (peace be upon him) said, 'The co-sharer is the most rightful person (to pre-empt) owing to his near proximity." '

عن جابر بن عبدالله
قال انما جعل رسول الله
صلی الله عليه وسلم
الشفعة فی كل مالم
يقسم فاذا وقعت
الحدو وصرفت الطرق
فلا شفعة —

XXIV. On the authority of Jabir, son of 'Abdullah, said he, "The Prophet of Allah has made pre-emption applicable to every property that has not been divided. But when the boundaries have been laid down and the passsages marked then there is no pre-emption."

عن ابن عمر قال قال
رسول الله صلی الله عليه
وسلم الشفعة كحل
العقال —

XXV. On the authority of Ibn Omar, said he, "The Prophet of Allah (peace be upon him) said, 'Pre-emption is like the untying of the tether (shackle)." '

عن ابن عمر قال قال
رسول الله صلی الله عليه
وسلم لا شفعة لشريک
علی شريک اذا سبقه
بالشراء ولا لصغير ولا لغائب-

XXVI. On the authority of Ibn Omar, said he, "The Prophet of Allah (peace be upon him) said, 'There is no pre-emption for a co-sharer against another co-sharer when he has already preceded the other in selling his own share nor is there pre-emption for a minor nor for an absentee." '

سنن نسائی ذکر الشفعة

From the Suran of Nasai—Chapter on Pre-emption.

عن جابر ان النبی صلی اللہ علیہ وسلم قال ایکم کانت لہ ارض اونخل فلا یبیعہا حتی یعرضہا علی شریکہ –

XXVII. On the authority of Jabir said he "The Prophet (peace be upon him) said 'Whosoever among you has a land or a palm-grove (garden) he should not sell it till he has offered it to his co-sharer." '

عن جابر قال قضی رسول اللہ صلی اللہ علیہ وسلم بالشفعة فی کل شرکة لم یقسم ربعة وحائط لایحل لہ ان یبیعہ حتی یوذن شریکہ فان شاء اخذ وان شاء ترک وان باع ولم یوذنہ فہواحق بہ –

XXVIII. On the authority of Jabir, said he, "The Prophet of Allah (peace be upon him) has ordained pre-emption in every joint property which has not been divided be it a house or a garden. It is not lawful for one to sell it until his co-sharer permits him to do so, and if he wishes he can take it or, if he so desires he may leave it. And if the seller sells it and has not been permitted to do so by the co-sharer then he (the co-sharer) is the most rightful person for it (can pre-empt it)."

عن ابی رافع قال قال رسول اللہ صلی اللہ علیہ وسلم الجار احق بسقبہ

XXIX. On the authority of Abu Rafi, said he, "The Prophet of Allah (peace be upon him) said, 'The Neighbour has the greatest right on account of his near proximity." '

عن الشرید ان رجلاً قال یارسول اللہ ارضی لیس لاحد فیہا شرکة ولا قسمة الاالجوار فقال رسول اللہ صلی اللہ علیہ وسلم الجاراحق بسقبہ-

XXX. On the authority of Al-Sharid that a certain man asked the Prophet saying "Oh Prophet of Allah, my land has no co-sharer nor has it been divided but it is adjacent to some neighbours' properties." The Prophet of Allah (peace be upon him) said, "The neighbour has the greatest right (to pre-empt) on account of his near proximity."

عن ابى سلمة ان رسول الله صلى الله عليه وسلم قال الشفعة فى كل مال لم يقسم فاذا وقعت الحدود و عرفت الطريق فلاشفعة —

XXXI. On the authority of Abu Salam: that the Prophet of Aliah (peace be upon him) said, "Pre-emption holds good in every property that is not divided but when boundaries and passages have been marked then there is no pre-emption."

عن جابر قال قضى رسول الله صلى الله عليه وسلم بالشفعة والجوار —

XXXII. On the authority of Jabir, said he. "The Prophet of Allah (peace be upon him) has ordained for pre-emption with reference to the neighbourhood."

Appendix I

THE HEDAYA[1]

BOOK XXXVIII

OF SHAFFA.

Definition of Shaffa.—SHAFFA, in the language of the LAW, signifies the becoming proprietor of lands sold for the price at which the purchaser has bought them, although he be not consenting thereunto. This is termed Shaffa, because the root from which Shaffa is derived signifies conjunction, and the lands sold are here conjoined to the land of the Shafee, or person claiming the right of pre-emption.[2]

Chap. I.—Of the Persons to whom the Right of Shaffa appertains.

Chap. II.—Of Claims to Shaffa; and of Litigation concerning it.

Chap. III.—Of the Articles concerning which Shaffa operates.

1 I have incorporated Charles Hamilton's excellent translation of the Hedaya, a well-known work by Maulana Burhanuddin. Hamilton had translated from a Persian translation of the Hedaya, and it may doutless be urged that the translation should have been made direct from the Arabic ; but I may add that the Persian version was very carefully and accurately translated, and interpolations if any have in fact made the sense more explicit and clear. It is also for these reasons that I have not inserted the Arabic text in the parallel columns, I have however compared the Arabic text and eventually decided to accept Hamilton's version rather than translate it myself. I have added few notes here and there and indicated them by my initials, (M.U.).

2 This passage is not a literal translation of the Arabic text, but the law contained is absolutely accurate.

Chap. IV.—Of Circumstances which invalidate the Right of Shaffa.

CHAPTER I.

OF THE PERSONS TO WHOM THE RIGHT OF SHAFFA APPERTAINS.

The right of Shaffa appertains to a partner in the property, a participator in the immunities of the property and to neighbour.—THE right of Shaffa appertains—I. to a partner in the property of the land sold,*—II. to a partner in the immunities and appendages of the land (such as the right to water, and to roads);* and III. to a neighbour.*—The right of Shaffa in a partner is founded on a precept of the prophet, who has said, "The right of SHAFFA holds in a partner who has not divided off and taken separately his share."—The establishment of it in a neighbour is also founded on a saying of the prophet, "The neighbour of a house has a superior right to that house; and the neighbour of lands has a superior right to those lands; and if he be absent, the seller must wait his return; provided, however, that they both participate in the same road;"—and also, "A neighbour has a right, superior to that of a stranger, in the lands adjacent to his own."—Shafei [2] is of opinion that a neighbour is not a Shafee;[3] because the prophet has said, "SHAFFA relates to a thing held in joint property, and which has not been divided off:" when, therefore, the property has undergone a division, and the boundary of each partner is particularly

---

*Commonly known by authors of the Anglo-Muhammadan Law as Shafii-i-Sharik, Shafil-i-Khalit and Shafi-i-jar respectively (M.U.)

[2] The founder of the second school of Muslim Jurisprudence (M.U.)

[3] In other words, "Is not entitled to the right of SHAFFA;"—Shafee being the term used to express the person endowed with that right.

discriminated, and a separate road assigned to each, the right of Shaffa can no longer exist. Besides, the existence of the right of Shaffa is repugnant to analogy,[1] as it involves the taking possession of another's property contrary to his inclination; whence it must be confined solely to those to whom it is particularly granted by the LAW. Now, it is granted particularly to a partner; but a neighbour cannot be considered as such; for the intention of the LAW, in granting it to a partner, is merely to prevent the inconveniences arising from a division; since if the partner were not to get that share which is the subject of the claim of Shaffa, a new purchaser might insist upon a division, and thereby occasion to him a great deal of unnecessary vexation;—but as this argument does not hold good in behalf of a neighbour, he therefore is not entitled to the privilege of Shaffa.—We,[2] on the contrary, allege that the precept of the prophet, already quoted, is a sufficient ground for establishing the right of Shaffa in a neighbour.—Besides, the reason for establishing this right in a partner is, the circumstance of his property being continually and inseparably adjoined to that of a stranger[3] (namely, the purchaser), which is injurious to him, because of the differeuce of a stranger's disposition, and so forth; and certainly a greater regard is due to the partner than to the stranger who may have made the purchase, since the vexation that would ensue to the partner from forcing him to abandon a place which, from long residence, may have acquired his affections, would doubtless be greater than that to which the stranger is subjected; for although he may thus be dispossessed, contrary to his inclination, of a

1 The doctrine of *qias* (M.U.)

2 Meaning, the Haneefites (in opposition to the followers of Shafei).

3 Arab. Dakheel; meaning, literally, "an arriver;" *i.e.*, a new comer.

property over which he has acquired a right by purchase, yet still the grievance is but inconsiderable, since he is not dispossessed without receiving a due consideration;—and as all these reasons equally hold in behalf of a neighbour, he is therefore entitled to the privilege of Shaffa as well as a partner.—The reason, moreover, on which Shafei grounds the right of a partner, and the distinction he makes betwixt a partner and a neighbour, can by no means be admitted; since the inconvenience attending a division of property are allowed by the LAW; and are not of such a nature that the preventing of them should justify the injury which must be committed in depriving another of his property contrary to his inclinations.—The order in which we have classed the persons entitled to the privilege of Shaffa is founded on a precept of the prophet, who has said, "A partner in the thing itself has a superior right to one who is only a partner in its appendages; and a partner in the appendages of the property precedes a neighbour." Besides, the conjunction occasioned by a partnership in the property itself is of all others the strongest; and next to it is that occasioned by a partnership in the appendages (since here the party participates in the immunities of the property, which is not the case with a neighbour); and a superiority of right, in every instance depends on the strength of the cause, or fundamental principle. The vexations, moreover, and inconvenience arising from a division may be admitted as an additional argument, although it be not of such weight as to form a ground for injury to another.

No person can claim it during the existence of one who has a superior right—A PARTNER merely in the road or the rivulet, or a neighbour, cannot be entitled to the privilege of Shaffa during the existence of one who is a

1 This view is not followed. (M.U.)

partner in the property of the land; for his is the superior right, as has been already shown.

Unless he first relinquish it, when the title devolves to the next in succession.—IF a partner in the of the land relinquish his right of Shaffa, it devolves next to him who is a partner in the road; and if he also relinquish his right, it falls to the Jar Molasick, or person whose house is situated at the back of that which is the object of Shaffa, having the entry to it by another road. Aboo-Yoosaf is of opinion, that during the existence of a partner in the ground, whether he resign or insist upon his right, no other person is entitled to the privilege of Shaffa; for by his existence all others are excluded;[1] and whilst the excluder remains the excluded have no right; as holds in inheritance.—The ground on which the Zahir Rawayet (first quoted as above) proceeds is, that the cause of the privilege of Shaffa exists with respect to each of the above-mentioned persons. The partner, however, has the superior right. Upon his relinquishing it, therefore, the one who is next to him in order of precedence will assume it;—in the same manner as holds with respect to debts conrtacted during health, when they came in competition with debts contracted in sickness; that is, the former are first discharge; but if the creditor whose debt was contracted in health relinquish his claim, the estate of the deceased is then appropriated to discharge the claim of him whose debt was contracted under sickness.

A person who is a joint proprietor of only a part of the article has a title superior to a neighbour.—A PERSON who is a joint proprietor of only a part of the property sold (such as a partner in a particular room or wall of a house), as he has a right superior to one who is neighbour to that particular part, so likewise has he a right superior to one who is a neighbour to the rest of the house. This

[1] This view is not followed. (M. U.)

is an approved maxim of Aboo Yoosaf; for the conjunction holds stronger in the case of a person who is a joint proprietor of only a part of the house, than in that of one who is merely a neighbour. It is necessary that the road or rivulet, the joint participation in which gives a claim to the privilege of Shaffa, be private. By a private road is understood a road shut up at one end; and by a private rivulet we understand a stream of water in which boats cannot pass and repass; for otherwise it is a public river. (This is according to Haneefa and Mohammed. It is reported from Aboo Yoosaf, that a private rivulet is a stream which affords water to two or three pieces of ground; but if it exceed that, it is a public one.)[1]

The relative situation of the property determines the right, when claimed on the plea of neighbourhood.—IF a house be sold, situated in a short lane, shut up at one end, communicating through another lane, shut up also at one end, but of greater extent, in this case the inhabitants of the short lane only are entitled to the privilege of Shaffa; whereas, if a house situated in the long lane be sold, the inhabitants of both lanes are so entitled. The reason of this is, that the right of egress and regress in the short lane is participated only by its own inhabitants, whereas the right in the long lane appertains equally to the inhabitants of both;—as has been already explained under the head of "Duties of the KAZEE." The same rule also holds good in the case of a small rivulet issuing out of another.

THE laying of beams on the wall of a house gives a right of Shaffa from neighbourhood, but not from partnership, since this act does not constitute a partnership in the property of the house. In the same manner, also, a person who is a partner in a beam laid on the top of a wall is only held in the light of a neighbour.

---

[1] The view of Imam Abu Hanifa is universally adopted by the jurists. (M.U.)

The right of all the Shafees (claiming upon equal ground) is equal, without any regard to the extent of their properties.—WHEN there is a plurality of persons entitled to the privilege of Shaffa, the right of all is equal, and no regard is paid to the extent of their several properties. Shafei maintains that the right of Shaffa in this case is possessed by the parties in proportion to their several properties; because Shaffa is one of the immunities of their property, and must therefore be held, like the profits of trade, the produce of lands, the offspring of slaves, or the fruit of trees, in proportion to their respective shares in the joint property. The argument of our doctors is, that the parties being all equal with respect to the principle on which their right of Shaffa is grounded (namely, a conjunction with the lands sold), they are all consequently equal in the right itself,—whence if only one partner were present, however inconsiderable his share might be, he would be entitled to the whole of the Shaffa.—In reply, moreover, to the arguments used by Shafei, it is to be observed that the disseising another of his property, contrary to his inclination, is not one of the immunities of property, and is very different from the profits of trade, the fruits of trees, or the like, which are produced absolutely from the property itself.

IF one of the parties relinquish his right, it devolves to the others, and is participated equally amongst them; for although the grounds of their right were complete, yet they were obstructed from enjoying the entire privilege by the intervention of his right; but that right being resigned, the obstruction consequently no longer remains.

If some be absent, the Shaffa is adjudged equally amongst those who are present:—but the absentees appearing receive there shares;—IF some of the partners happen to be absent, the whole of the Shaffa is to be decreed equally amongst those who are present; for it is

a matter of uncertainty whether those who are absent would be inclined to demand their right; and the rights of those who are present must not be prejudiced on a mere uncertainty.—If, however, the Kazee should have decreed the whole of the Shaffa to one who is present, and an absentee afterwards appear and claim his right, the Kazee must decree him the half; and so likewise if a third appear, he must decree him one third of the shares respectively held by the other two; in order that thus an equality may be established amongst them.

IF the person present should relinquish his Shaffa after the whole has been decreed to him by the Kazee, and the absentee afterwards appear, he is in this case entitled to claim only one half; because the decree which the Kazee has passed, awarding the whole to the other, absolutely extinguished one half of the absentee's right.—It were otherwise if the person present relinquish his right previous to any decree being passed by the Kazee, and afterwards the absentee appear; for in this case he [the absentee] is entitled to the whole of the Shaffa.

The right does not operate until after the sale of the property.—THE privilege of Shaffa is established after the sale; for it cannot take place until it be manifest that the proprietor is no longer inclined to keep his house; and this is manifested by the sale of it.[1] It is therefore sufficient, in order to prove the sale and establish the privilege of Shaffa, that the seller acknowledge the sale, although the person said to be the buyer deny it.

Nor until it be regularly demanded.—THE right of Shaffa is not established until the demand be regularly made in the presence of witnesses; [2]—and it is requisite that

---

1 It must be valid Sale, there is no right of Pre-emption in an invalid sale *vide* sections 5 and 6 pp. 6—9. (M.U.)

2 The Arabic expressions are *talabulmuwasabat,* and *Ishhad.* Hamilton's translation is not quite accurate, "the

it be made as soon as possible after the sale is known; for the right of Shaffa is but a feeble right, as it is the disseising another of his property merely in order to prevent apprehended inconveniences.—It is therefore requisite that the Shafee without delay discover his intentions, by making the demand; which must be done in the presence of witnesses, otherwise it cannot be afterwards proved before the Kazee.

Neither does the property go to the Shafee but by the surrender of the purchaser, or a decree of the magistrate.—WHEN the demand has been regularly made in the presence of witnesses, still the Shafee does not become proprietor of the house until the purchaser surrender it to him, or until the magistrate pass a decree; because the purchaser's property was complete, and cannot be transferred to the Shafee but by his own consent, or by a decree of a magistrate; in the same manner as in the case of a retraction of a grant,[1] where the property of the grantee being completely established by the grant, it cannot be transferred to the granter, but by the surrender of the grantee, or by a decree of a magistrate. The use of this law appears in a case where the Shafee, after having preferred his claim before witnesses previous to the decree of the magistrate or the surrendor of the purchaser, dies, or sells the house from whence he derived his right;—or where the house adjoining to that to which the right of Shaffa relates is sold; for in the first of these instances the house is not a part of his hereditaments, beeause it was not his property; and the right of Shaffa fails in the second instance, as the fundamental principle of that right is extinguished previous to his becoming the proprietor; and in the third case, he has no right of Shaffa with respect

right of pre-emption is not established until *talab-i-muwasabat* is made and is strengthened by *talab-i-'ishhad.*" (M.U.).

[1] The Arabic word is *hiba,* gift (M.U.).

to the house which is sold, since the house from which he would have derived that right is not his property.[1]

CHAPTER II.

OF CLAIMS TO SHAFFA, AND OF LITIGATION CONCERNING IT.

The claims are of three kinds. I. The immediate claim (which must be made on the instant, or the Shafee forfeits his title).—CLAIMS to Shaffa are of three kinds.—The first of these is termed Talb Mawasibat, or immediate claim, where the Shafee prefers his claim the moment he is apprised of the sale being concluded; and this it is necessary that he should do, insomuch that if he make any delay his right is thereby invalidated; for the right of Shaffa is but of a feeble nature, as has been already observed; and the prophet, moreover, has said, "The right of SHAFFA is established in him who prefers his claim without delay."

IF the Shafee receive a letter which, either in the beginning or the middle, apprises him of the circumstance of his Shaffa, and he read it on to the end, his right of Shaffa is thereby invalidated. Many of our modern doctors accord in this opinion; and it is in one place recorded as the doctrine of Mohammed.—In another place, however, it is reported from him, that if the man claim his Shaffa in the presence of the company amongst whom he may be sitting when he receives the intelligence, he is the Shafee, his right not being invalidated unless he delay asserting it till after the company have broke up. Both these opinions

---

1 It appears from the Arabic text that in Hamilton's translation about three lines have been omitted, which are as follows. "Similarly in a contract of sale where some property, *mal*, is exchanged for another *mal* the right of pre-emption arises, and if it were not so then no right of pre-emption arises. The Law with reference to these will be discussed later on." (M.U.).

are mentioned in the Nawadir; and Koorokhee passed decrees agreeably to the last quoted report; because the power of accepting or rejectiug the Shaffa[1] being established a short time should necessarily be allowed for reflection; in the same manner as time is allowed to a woman to whom her husband has given the power of chosing to be divorced or not.

IF the Shafee, on hearing of the sale, exclaim "Praises be to GOD!" or "There is no power or strength but what is derived from GOD!" or "GOD is pure!" his right of Shaffa is not invalidated, insomuch that if, immediately on pronouncing these words, he without delay claim his Shaffa, he will accordingly get it; because the first of these is considered as a thanksgiving on his being freed of the neighbourhood of the seller; the second (which is an expression of admiration) is supposed to proceed from the astonishment with which he is struck at the intention manifested by the seller of doing a thing which would be vexatious to him; and the last is considered as an exclamation prefatory to further discourse. None of these expressions, therefore can imply a refusal or rejection of the Shaffa.—In the same manner also, if, on receiving the news of the sale, he ask "Who is the purchaser, and how much is the price?" it does not invalidate his right; since these questions cannot be considered as a refusal, but on the contrary it may be concluded from them that if the price be reasonable, and the purchaser a person whom he would not like as a neighbour, he will afterwards claim his right of Shaffa.[2]

1 According to the Arabic text it literally means ownership (M.U.).

2 It appears from the Arabic text that the following lines have not been translated.

"It is mentioned in the book that the pre-emptor should invoke witness of the demand at the same meeting, the demand referred to is the *talab-i-muwasabat*, in which it is not essential

IT is not material in what words the claim is preferred; it being sufficient that they imply a claim. Thus if a person say "I have claimed my Shaffa," or "I shall claim my Shaffa," or "I do claim my Shaffa," all these are good; for it is the meaning, and not the style or mode of expression, which is here considered.

WHEN news of the sale is brought to the Shafee, it is not necessary, according to Haneefa, that he assert his intention of claiming the Shaffa before witnesses, unless the news be communicated to him by two men, or one man and two women, or one upright man. The two disciples maintain that he ought to declare his intentions before witnesses as soon as the news is communicated to him by one person, being either a freeman or a slave, a woman or a child,—provided, however, that the person be, in his belief, a true speaker.—It is otherwise where a woman is informed that her husband has given her the power of divorcing herself; for in that case it does not signify who is the informer, or what is his character.

IF the person who gives the intelligence to the Shafee be himself the buyer, it is not (according to Haneefa) in such case necessary that he be an upright man; because he is the opponent; and uprightness is not requisite in him.

II. The claim by affirmation and taking to witness (which must be made as soon as conveniently may be after the other).—THE second mode of claim to Shaffa is termed the Talb Takreer wa Ish-had, or claim by affirmation and taking to witness;—and this also is requisite; because evidence is wanted in order to establish proof before the magistrate; and it is probable that the claimant cannot

to invoke witnesses, but it may be desirable to do so with a view to prove before the Kazi (court) the fact of demand having been made. Kurkhi mentions here 'the meeting' because he approves of the accepted view (that the demand should be made before the meeting breaks up)."

have witnesses to the Talb Mawasibat, as that is expressed immediately on intimation being received of the sale. It is therefore necessary afterwards to make the Talb Ish-had wa Takreer, which is done by the Shafee taking some person to witness,—either against the seller, if the ground sold be still in his possession,—or against the purchaser,—or upon the spot regarding which the dispute has arisen; and upon the Shafee thus taking some person to witness, his right of Shaffa is fully established and confirmed. The reason of this is, that both the buyer and seller are opponents to the Shafee in regard to his claim of Shaffa; the one being the possessor, and the other the proprietor of the ground;—and the taking evidence on the ground itself is also valid; because it is that to which the right relates. If the seller have delivered over the ground to the buyer, the taking evidence against him is not sufficient, he being no longer an opponent; for having neither the possession nor the property, he is as a stranger. The manner of claim by affirmation and taking to witness is, the claimant saying "Such a person has bought such a house, of which I am the Shafee; I have already claimed my privilege of Shaffa, and now again claim it: be therefore witness thereof." (It is reported from Aboo Yoosaf that it is requisite the name of the thing sold, and its particular boundaries, be specified; because a claim is not valid unless the thing demanded be precisely known).

And III. claim by litigation [1]—THE third mode of claim to Shaffa is termed Talb Khasoomat, or claim by litigation, [2]—which is performed by the Shafee petitioning the Kazee to command the purchaser to surrender up the

---

[1] Talab-i-tamlik (M.U.).

[2] It appears from the Arabic text that the following line has not been translated. "God willing" we shall describe this Talab later on, here we are simply mentioning its effects." (M.U.).

ground to him; the method of doing which will hereafter be particularly explained.

A delay in the litigation does not invalidate the claim.—If the Shafee delay making claim by litigation, still his right does not drop, according to Haneefa. Such also is the generally received opinion; and decrees pass accordingly. There is likewise one opinion recorded from Aboo Yoosaf to the same effect. Mohammed maintains that if the Shafee postpone the litigation for one month after the taking of evidence, his right drops. This is also the opinion of Ziffer;[1] and it is related as an opinion of Aboo Yoosaf, that the right of the Shafee becomes null if he delay the litigation after the Kazee has held one court; for, if he willingly, and without alleging any excuse, omit to commence the litigation at the first court held by the Kazee, it is a presumptive proof of his having declined it. The reasoning on which Mohammed founds his opinion in this particular is, that if the right of the Shafee was never to be invalidated by his delaying the litigation, it would be very vexatious to the buyer; for he would be prevented from enjoying his property, in the apprehension of being deprived of it by the claim of the Shafee.—"I have therefore (says Mohammed) limited the delay that may be admitted to one month, as being the longest allowed term of procrastination."—In support of the opinion of Haneefa,[2] it is urged that the right of the Shafee being firmly established by the taking of evidence, it cannot be extinguished but by his own rejection, openly declared;—in the same manner as holds in all other matters of right.—

1 A line here is also not translated. "This is also the opinion of Zafar but he means a case without lawful excuse." (M.U.).

2 A line here is also not translated.

"In support of the opinion of Haneefa which is the accepted view and on which *fatwa* is given."

With respect to what is mentioned by Mohammed, that "the delay would be vexatious to the buyer," it is of no weight; for in case of the absence of the Shafee, his right is not invalidated by the litigation being delayed; and the vexation sustained by the buyer from the delay is equally the same whether, the Shafee be present or absent.

Particularly, if it be occasioned by the absence of the magistrate.—IF it appear that the Kazee was not in the city, and that on that account the litigation was delayed, the right is not invalidated, according to the concurrent opinion of the three above-mentioned sages; for the litigation can only be made in the presence of the Kazee; and the delay is therefore excused.

Rules to be observed by the magistrate on an appeal. WHEN the Shafee goes to the Kazee and claims his right alleging that "such a person has purchased a house, in which he has the right of Shaffa," the Kazee must first question the purchaser (the defendant in the cause) concerning the property on which the Shafee grounds his right of Shaffa; and if he acknowledge it, this is a sufficient ground for the Kazee passing a decree:—but if he deny it, the Kazee must then order the Shafee to bring witness to prove his property; for the possession, which is apparent, may be owing to other causes than property; and a thing which is thus doubtful cannot be admitted as a proof to the detriment of another. Kadooree[1] alleges that the Kazee, before he applies to the defendant, ought to ask the plaintiff regarding the situation of the house and its boundaries; because if a man sue for the property of a house, it is requisite that he describe its situation and boundaries; and therefore he must do the same in claiming his right of Shaffa. When he has done this, the Kazee must next interrogate him regarding the

1 This name does not appear in the Arabic text. (M.U.)

grounds of his right of Shaffa; for the grounds of Shaffa are various, and possibly he may set forth grounds according to his own imagination, which do not, in reality, constitute any ground.[1] If he reply that "he is the Shafee, because of his house being situated next to that which is the present object of dispute," his claim (as Khasaf observes) is complete. It is also mentioned in the Fatavee, that he must describe the boundaries of the house from whence he derives his right to the Shaffa in question.

And the mode prescribed for his examining the parties.—If the Shafee, being unable to bring witnesses, require that the purchaser be put to his oath, it must be tendered merely according to the best of his [the purchaser's] knowledge (that is, he must be required to say, "By God, I know not that the plaintiff is the proprietor of the house on which he founds his claim of Shaffa"); because his deposition relates to a thing which is in the hands of another, and therefore he can only swear as to his own knowledge, and not positively as to the fact in question, namely, whether the house be, for certain, the property of the plaintiff or not.—If the purchaser refuse to swear, or the Shafee bring evidence his property is proved in that house from which he derives his claim of Shaffa, and the neighbourhood of that house to the one in dispute is also proved. The Kazee must next ask the purchaser whether he has bought the house or not? and if he deny it, the Kazee must order the Shafee bring to witnesses to prove the purchase; for the Shaffa cannot be established until the sale be proved; which must be done by witnesses.—If the Shafee cannot bring witnesses, the Kazee must administer an oath to the purchaser to this effect, that "he has not purchased

[1] This passage does not appear in the Arabic text "and possibly....................ground." (M.U.)

the house;" or that "the plaintiff is not entitled to the privilege of Shaffa in the manner in which he has claimed it;" for here he swears regarding an act committed by himself, and relative to a thing which is in his own possession; and therefore it is necessary that the oath be positive as to the certainly of the fact.[1]

The cause may be litigated and determined independent of the price of the property in dispute.—THE Shafee may litigate his claim of Shaffa although he do not pro luce in court the price of the ground in dispute:—but when the Kazee has decreed to him the privilege of Shaffa, it is necessary that he bring the price. That is the doctrine of the Zahir Rawayet, as quoted in the Mabsoot. It is reported, from Mohammed, that the Kazee ought not to pass the decree until the Shaffee produce the price (and the same is also cited by Hasan from Haneefa); because possibly the Shafee may be indigent, and the Kazee must therefore delay the decree, in order that the purchaser may not lose his property.—The reason assigned in support of the first opinion quoted from the Zahir Rawayet, is that the price does not become due from the Shafee to the purchaser until the Kazee have passed his decree; and as the purchaser is not obliged to surrender up the ground previous to the decree, so in the same manner the Shafee (as has been mentioned above) is under no necessity of previously producing the price:—nor can there be any apprehension of the purchaser losing his property, since he has the right of detention, as will more particularly be shown in the ensuing examples.

But the defendant may retain the one until the other be produced.—WHEN, previous to the Shafee producing

---

[1] Here a line has also been omitted *viz.*, "we have stated this law in the chapter on litigation." (M.U.)

the price, the Kazee has commanded the purchaser to deliver up the ground [to the Shafee], still he may retain it in his own hand until the price be brought to him.

The privilege is not forfeited by a delay in the payment.—IF the Shafee delay to pay the price to the purchaser, after the Kazee has ordered him, still his privilege of Shaffa is not invalidated; for it has become firmly established by the litigation and the decree of the Kazee.

The seller may be sued whilst the house is in his possession.—IF the Shafee bring the seller into court whilst the house is still in his possession, he [the Shafee] may commence his litigation against him, and the seller may retain the house in his own possession until he receive the price from the Shafee. The Kazee, however, is not in this case to hear the evidence until the purchaser also appear, as for his presence there is a twofold reason; for FIRST, the purchaser is proprietor of the ground, and the seller the possessor; and as the decree of the Kazee must be against both, both therefore must be present. (It is otherwise where the purchaser has obtained possession; for then there can be no occasion for the presence of the seller, as he has become like a stranger, having neither the property nor the possession.) SECONDLY, the sale or bargain which had been concluded in favour of the purchaser is to be dissolved by decree; and it is therefore requisite that he be present, in order that the Kazee may decree the dissolution against him.[1]

---

[1] It appears from the Arabic text that several lines of which the meaning is somewhat ambiguous, have not been translated.

"For it is not desirable to decree a suit against an absentee. When the pre-emptor has brought a suit, then the vendee is no more entitled to keep the property and the sale in his favour is set aside, though it remains effective in the interest of the pre-emptor who is henceforth treated in the same position as the vendee and the burden of the contract is on the vendor (since he

An agent for the purchaser may be sued (before delivery to his constituent).—IF an agent on behalf of another purchase ground, the Shafee must sue the agent. If, however, the agent have delivered over the ground to his constituent, the Shafee must not institute his suit against the agent (as he is neither the proprietor nor the possessor), but against his constituent; for the agent then stands as the seller, and his constituent as the purchaser; and when (as has been already explained) the seller delivers up the ground to the purchaser, the Shafee's suit is against the latter.

And so also an agent for the seller, or an executor.—IF the agent of a person who is absent sell ground on account of his constituent, the Shafee may claim his right and obtain the ground from the agent, provided it be in his possession. The same rule also holds in the case of an executor authorized to sell lands.

The Shafee, after gaining his suit, has an option of inspection, and also an option from defect.—IF the Kazee decree in favour of the Shafee, at a time when he has not yet seen the property in dispute, he [the Shafee] has an option of inspection; and if any defect be afterwards discovered in it, he has an option from defect, [1] and may, if he please, reject it, notwithstanding the purchaser should have expected such defect from the bargain, or, in other words, should have exempted the seller from responsibility for such defect; because, as the transfer of property by right of Shaffa is the same as a transfer of property by sale, the Shafee has therefore,

---

is in possession) but if the property were in the possession of the vendee then the burden of contract is on him and for which reason the sale is set aside. It is so stated in the Kifaya-ul-munteha in detail." (M.U.)

[1] Option of inspection and option from defect are fully explained under the head of SALE. (See *Hedaya* Vol. II. p. 255 and 258.)

the price, the Kazee has commanded the purchaser to deliver up the ground [to the Shafee], still he may retain it in his own hand until the price be brought to him.

The privilege is not forfeited by a delay in the payment.—IF the Shafee delay to pay the price to the purchaser, after the Kazee has ordered him, still his privilege of Shaffa is not invalidated; for it has become firmly established by the litigation and the decree of the Kazee.

The seller may be sued whilst the house is in his possession.—IF the Shafee bring the seller into court whilst the house is still in his possession, he [the Shafee] may commence his litigation against him, and the seller may retain the house in his own possession until he receive the price from the Shafee. The Kazee, however, is not in this case to hear the evidence until the purchaser also appear, as for his presence there is a twofold reason; for FIRST, the purchaser is proprietor of the ground, and the seller the possessor; and as the decree of the Kazee must be against both, both therefore must be present. (It is otherwise where the purchaser has obtained possession; for then there can be no occasion for the presence of the seller, as he has become like a stranger, having neither the property nor the possession.) SECONDLY, the sale or bargain which had been concluded in favour of the purchaser is to be dissolved by decree; and it is therefore requisite that he be present, in order that the Kazee may decree the dissolution against him.[1]

---

[1] It appears from the Arabic text that several lines of which the meaning is somewhat ambiguous, have not been translated.

"For it is not desirable to decree a suit against an absentee. When the pre-emptor has brought a suit, then the vendee is no more entitled to keep the property and the sale in his favour is set aside, though it remains effective in the interest of the pre-emptor who is henceforth treated in the same position as the vendee and the burden of the contract is on the vendor (since he

An agent for the purchaser may be sued (before delivery to his constituent).—IF an agent on behalf of another purchase ground, the Shafee must sue the agent. If, however, the agent have delivered over the ground to his constituent, the Shafee must not institute his suit against the agent (as he is neither the proprietor nor the possessor), but against his constituent; for the agent then stands as the seller, and his constituent as the purchaser; and when (as has been already explained) the seller delivers up the ground to the purchaser, the Shafee's suit is against the latter.

And so also an agent for the seller, or an executor.—IF the agent of a person who is absent sell ground on account of his constituent, the Shafee may claim his right and obtain the ground from the agent, provided it be in his possession. The same rule also holds in the case of an executor authorized to sell lands.

The Shafee, after gaining his suit, has an option of inspection, and also an option from defect.—IF the Kazee decree in favour of the Shafee, at a time when he has not yet seen the property in dispute, he [the Shafee] has an option of inspection; and if any defect be afterwards discovered in it, he has an option from defect, [1] and may, if he please, reject it, notwithstanding the purchaser should have expected such defect from the bargain, or, in other words, should have exempted the seller from responsibility for such defect; because, as the transfer of property by right of Shaffa is the same as a transfer of property by sale, the Shafee has therefore,

---

is in possession) but if the property were in the possession of the vendee then the burden of contract is on him and for which reason the sale is set aside. It is so stated in the Kifaya-ul-munteha in detail." (M.U.)

[1] Option of inspection and option from defect are fully explained under the head of SALE. (See *Hedaya* Vol. II. p. 255 and 258.)

under both the above circumstances, the power of rejection, in the same manner as any other purchaser; and this power in the Shafee is not destroyed by the purchaser having seen the property, or having so exempted the seller; for he [the purchaser] was not deputed by the Shafee, and his act, of course, does not affect the Shafee's power of rejection.

Section

Of Disputes relative to the Price.[1]

In disputes concerning the price, the assertion of the purchaser, upon oath, must be credited.—IF the purchaser and Shafee differ regarding the price, the former alleging one hundred, for instance, and the latter only eighty and neither of them be able to bring any evidence, the assertion of the purchaser must be credited in preference to that of the Shafee; because here the Shafee alleges a right in the purchaser's property for a sum short of one hundered, which the purchaser denies; and, according to the LAW, the declaration of a defendant, upon oath, must be credited:—neither is the oath of both parties[2] required in this case; for the Shafee is plaintiff against the purchaser, but the purchaser is not plaintiff against the Shafee, he being at liberty either to claim or resign the thing in question; and it is a rule that both parties cannot be called on to swear, unless where both are in some manner plaintiff, or in some particular cases, where it is expressly ordained by the LAW, neither of which reasons exist in the present instance.

---

1 The Law contained (as regards evidence) in some passages of this section may be taken to be obsolete in British India (M.U.)

2 Arab Tahalif.—For a full explanation of this term see p. 417 of this Vol. (*Hedaya*).

And so likewise evidence produced by him.—IF both the purchaser and the Shafee produce evidence, that produced by the Shafee must be credited, according to Haneefa and Mohammed. Aboo Yoosaf, on the contrary, maintains that the evidence produced by the purchaser must be credited; because it proves a larger sum than the other, and it is a general rule that regard is had to the evidence which proves the most;—as where, for instance, a difference arises regarding the amount of the price betwixt a purchaser and a seller, or an agent and his constituent, or a person who buys a thing from an infidel enemy, and the original proprietor of the thing;—in all which cases, if both parties bring evidence, the evidence of him who proves the largest sum is admitted.—The difference here alluded to betwixt one who buys a thing from an infidel enemy, and the former proprietor of the thing, will be better elucidated by the following case.—A Mussalman merchant goes upon a voyage, arrives in the country of the infidels, receives their protection, and, whilst he remains there, purchases a slave, who had formerly belonged to Zeyd, from an infidel, who had carried him away as his plunder; and, on the merchant's return, Zeyd claim his slave, offering the price which the merchant had given to the infidel; but a difference arising betwixt them regarding the amount of the price, both adduce evidence to prove the sum they asserted;—in which case the evidence of the merchant, which goes to prove the largest sum, is admitted, in preference to that of Zeyd.—In support of the opinion maintained by Haneefa and Mohammed on this point, two arguments may be urged.—FIRST, the evidence of the Shafee subjects the purchaser to an obligation; whereas the evidence of the purchaser does not subject the Shafee to any obligation, since he has it in his option to take the thing in dispute or not; and the intention of establishing

evidence is to impose an obligation.—SECONDLY, if it be possible, a regard should be paid to the evidence of both parties; and here it is possible, for there is no absolute contradiction in the allegation of the two parties, since the purchaser may perhaps have twice purchased the thing; and both purchases being thus apparently proved, it remains in the option of the Shafee to prefer whichever he pleases; that is to say, if the purchaser have bought the thing twice, *viz.*, once for one thousand, and another time for two thousand, the Shafee has it in his option to take the thing for whichever of these prices he thinks proper.—With respect to the analogy urged by Aboo Yoosaf betwixt the case in question and that of a purchaser and a seller differing concerning the amount of the price, it cannot be admitted; for if two different sales take place betwixt the parties, one immediately after the other, regarding the same thing, the one sale invalidates the other; and it being thus impossible to admit the allegations and evidence of both parties, that evidence which proves the largest sum must be superior; and the superiority is therefore allowed to the evidence of the seller over that of the purchaser, because it proves the largest sum. In the case of the Shafee, on the contrary, as the maxim of one sale invalidating the other does not affect him, both the sales hold good with respect to him;—whence if the purchaser choose to purchase the same thing twice, the Shafee has it in his option to take it for either of the prices, as has been mentioned above. Besides, as an agent is supposed to stand in the place of a seller, and his constituent in that of a purchaser, the same laws will of course hold with respect to them as are established in the case of a buyer and a seller; and this is confirmed by a precept quoted from Mohammed, in which it is expressly said, that " the evidence brought by the constituent is preferable."—With

respect, also, to the analogy urged [by Aboo Yoosaf] betwixt the case in question and that of a dispute between the purchaser of a slave from an infidel and the former master of such slave, it is entirely unfounded, since it cannot be admitted that the effect of the branch is the same as that of the root, as we find it expressly declared in the Seyir Kabeer, that the evidence adduced by the former master of the slave is superior. But even admitting the above-mentioned proposition, still the argument is of no weight; for in the case of the merchant two bargains could not be made successively without the one of them being invalidated; whereas in the case of the Shafee (as we have already observed) both bargains may be effective.

And also his assertion, if the seller allege a larger amount.—IF the seller and purchaser differ regarding the price, and the seller (supposing him not yet to have received it) allege the smallest sum, the Shafee may take the house for the price alleged by the seller, the assertion made by him of a smaller sum being considered as an abatement in favour of the purchaser, of which the Shafee is entitled to avail himself. We shall have occasion in the ensuing section to explain the ground on which this law is founded; and shall therefore in this place assign only one reason, namely, that the right given to the Shafee over the seller arises from his own declaration, in saying, "I have sold it for such a price;" and therefore, so long as he has not received the price, his allegation must be credited regarding it,—whence the Shafee is entitled to take the property at a rate agreeable to his assertion.—If, on the contrary, the seller allege the largest sum, both parties must be required to swear, and the contract of sale is then dissolved. If, in this case, either of them refuse to swear, that price is established which has been set forth by the other, and the Shafee is consequently entitled to

take the house for that amount. If, on the other hand, both parties swear, the Kazee, at the requisition of one or both of them, must dissolve the sale; and the Shafee (whose right is not to be prejudiced by such dissolution) may then take the house for the amount alleged by the seller.

If the seller should have received the price, the Shafee may take the house for the amount set forth as the price by the purchaser; and here the allegation of the seller is of no weight or credit, for having received the price, the sale, as far as relates to him, is finally concluded, and he becomes only as a stranger; the dispute then lying betwixt the purchaser and the Shafee, regarding which we have already been very explicit in a former part of this section.

Case in which the seller's assertion may be credited concerning the price. [1]—If the Shafee be not apprized of the seller's having received the price, and the seller should say, " I have sold the property for one thousand dirms, which I have received," in this case the Shafee is entitled to take the property for one thousand dirms; for, as the beginning of the seller's speech, in which he acknowledges the sale, creates the Shafee's right of Shaffa, the subsequent sentence, in which he asserts his having received the price, as tending to extinguish that right which he has himself created, must not be admitted. But if the seller should say, " I have sold the ground and received the price," and then should add, " which was one thousand dirms," his evidence with respect to the amount of the price cannot be admitted, because by the prior acknowledgment of his having received the price, he becomes like a stranger, and has no further concern or interest in the matter.

---

[1] This part of the law may be taken to be obsolete in British India (M.U.)

Section.

Of the Articles in lieu of which the Shafee may take the Shaffa Property.

The Shafee is entitled to the benefit of any abatement made to the purchaser, but not to that of a total remission.—IF the seller abate a part of the price to the purchaser, the Shafee is entitled to the benefit of such abatement; whereas if the seller, after the sale, remit the whole of the price to the purchaser, the Shafee is not allowed to avail himself of such indulgence. The reason of this distinction is, that an abatement of a part is an act connected with, and referring to, the original bargain or sale; and the Shafee is entitled to the benefit of it, because that sum which remains after deducting the abatement is the price; whereas an entire remission has no connexion with the original bargain. In the same manner also, if the seller abate a part of the price, after the Shafee has become seised of his Shaffa property, he [the Shafee] is entitled to the benefit of such abatement, and accordingly receives back the amount abated by the seller to the purchaser.[1]

He is not liable for any augmentation agreed upon after the sale.—IF, on the contrary, the purchaser, after the bargain is concluded, agree to an augmentation of the price in favour of the seller, the Shafee is not liable for such augmentation; because his privilege of Shaffa is established for the price originally settled; and if any subsequent augmentation were admitted to operate with respect to him, it would be a loss to him; whereas, on the contrary, any subsequent abatement is a benefit. Analogous to this case of augmentation is that formerly stated,

---

[1] It appears from the Arabic text that a line has not been translated *viz.*, "When the seller has remitted the whole of the price, then this remission is not taken into consideration for there can be no sale without consideration as stated in the Book of Sale." (M.U.)

in which it was remarked, that if a man make a purchase for a certain price, and afterwards renew the purchase of the same thing, and settle a large price, the Shafee is not prejudiced by such augmentation, but is entitled to his Shaffa for the price first agreed upon.

If the price consist of effects, the Shafee may take it on paying the value of those effects ; but if it consist of similars, he is to pay an equal quantity of the same.—IF a man sell a house for a certain quantity of goods or effects, the Shafee is entitled to take it for the value of such effects ; for effects are amongst the things denominated Zooat-al-Keem, or things which, being estimable, are compensable by an equivalent in money.—If, on the other hand a man sell a house for a cempensation in wheat, silver or any other article estimable by measure or weight the Shafee may take it for an equal quantity of the same article ; because these are of the class of Zooat-al-Imsal, or things compensable by an equal quantity of the same species. The reason of this is that the revealer of the LAW [1] has established in the Shafee a right to take possession of the property of the purchaser, on giving him a compensation similar to the price which he has paid ;—it is therefore necessary that a similarity betwixt the compensation and price be observed as nearly as possible, in the same manner as in cases of destruction of property.—(It is to be observed that articles which differ very little in their unities, such as walnuts or eggs, are included under the denomination of Zooat-al-Imsal, or things compensable by an equal quantity of the same species. If, therefore, a man purchase ground for walnuts or eggs, the Shafee

[1] Meaning, the Prophet, who is often termed Shari, or the lawgiver. [In my opinion Shari does not refer to the Prophet the word used in the text is shara which means the law." (M.U.).]

may give him a compensation in walnuts or eggs, and is not required to pay an equivalent in money.)[1]

And so likewise, if the price consist of land.—IF a man sell a piece of ground for another piece of grounds in this case as each piece of ground is the price for which the other is sold, the Shafee of each piece is entitled to take it for the value of the other, land being of the class of Zooat-al-Keem, or things compensable by an equivalent in money.

In case of a term of credit, the Shafee may either wait the expiration of the term, or take the property immediately, upon paying the price.—IF a house be sold for a price payable at a distant period, the Shafee may either wait until that period be expired, and then take the house for the same price,—or he may take it immediately, on paying the price in ready money : but he is not entitled to take it immediately and demand a respite to the period settled by the purchaser. Ziffer maintains that the Shafee is entitled to take the house immediately, and demand a respite of the payment (and such also is the opinion of Shafei) ; for the respite is a modification of the price, in the same manner as if it were stipulated to be paid in coin of an inferior species ; and as the Shafee is entitled to take the house for the price itself, he is of course entitled to take it for the price under its modification. The argument adduced by us,[2] in support of the former opinion, is that a delay or respite cannot be established but by a positive stipulation betwixt the parties ; and in the present case there is not any stipulation, either betwixt the Shafee and the seller, or the Shafee and the purchaser :—nor can the seller's consenting to a respite in favour of the purchaser be construed into a consent to respite in favour of the Shafee ; for men, as they differ in

---

1 The whole of this passage is not found in the Arabic text. It is simply illustrative. (M.U.)

2 The Hanafi jurists. (M.U.)

their circumstances, are more or less capable of discharging their debts.—With respect, moreover to the arguments used in behalf of Ziffer's opinion, it is true that the respite is a modification of the price; yet the law is not to be bent thereby; for the respite is, in fact, a right of the purchaser; but if it were admitted a modification of the price, it would be a right of the seller, like the price itself;—this case being analogous to where a man purchases a thing for a price payable at a distant time, and afterwards sells it again by a tawleeat sale;—in which instance, if no such stipulation be expressed, the second purchaser is not entitled to a term of credit,—and so here likewise. —If, in the case here considered, the land be still in the possession of the seller, and the Shafee take it and pay him the price in ready money, his [the seller's] claim against the purchaser ceases; for the bargain with respect to him is dissolved, and the Shafee is substituted in his place, as has been already explained.—If, on the contarary the land be in the possession of the purchaser, and the Shafee take it from him, still the seller must allow to the purchaser the term of credit originally settled; because the bargain betwixt them is not dissolved by the Shafee's taking the land, and the case is therefore the same as where a person makes a purchase upon credit, and then sells the article for ready money, in which case the first seller is not entitled to demand ready money from him. It is, however, lawful for the Shafee to defer taking the land until the term of credit be expired: but he must make his demand without delay; for if he neglect to make an immediate demand, his right of Shaffa, according to Haneefa and Mohammed, becomes null:—contrary to the opinion of Aboo Yoosaf.—The reason for the opinion of Haneefa and Mohammed upon this head is, that the Shaffa has existence from the time of the sale, it is therefore requisite that the claim be made upon the instant of the sale being known. The

reason for Aboo Yoosaf's opinion is that "the only use of the claim is to enable the Shafee to take the land," which end cannot be at present effected, whence he remains silent; and as this silence does not argue any recession from his right, that is consequently not invalidated. To this, however, it may be replied, that the taking of the land is a matter posterior to the claim; and the Shafee has it, moreover, in his power to take it on the instant, by paying down the price.

Case of property subject to Shaffa, purchased by a Zimmee for a price consisting of unlawful articles.—IF a Zimmee purchase land for wine or pork, and the Shafee be also a Zimmee, he [the Shafee] may take the land for an equal quantity of similar wine, or for the value of the pork; because a bargain of this kind is held valid amongst Zimmees; and as the right of Shaffa is enjoyed in common by both Mussulmans and Zimmees, and wine, amongst the latter, is held as vinegar amongst the former, and hogs as sheep, it follows that, vinegar being included under the denomination of Zooat-al-Imsal, and sheep under that of Zooat-al-Keem, the Shafee is at liberty to take the land for an equal quantity of wine, or for the value of the pork. If, on the contrary, the Shafee be a Mussulman, he is to take the land for the value of the wine as well as of the pork; for the giving or receiviug of wine amongst Mussulmans is prohibited by their religion, and it is therefore, with respect to them, reckoned also amongst the things which are of the denomination of Zooat-al-Keem.—If, on the other hand, there be two Shafees, the one a Mussulman and the other a Zimmee, the former must take half of the land for half the value of the wine, and the latter the other half, for half the quantity of the wine.—If, also, the Zimmee Shafee become a Mussulman, as his right is strengthened, not invalidated, by his conversion, he is therefore to take his half of the

land for half of the value of the wine; because, by his embracing the faith, he is incapacitated from paying the actual wine, which then (as it were) becomes non-existent with respect to him;—in the same manner as where a person makes a purchase of a house for a measure of green dates, and a Shafee afterwards appears, at a time when the season for green dates is past, in which case he must take the house for the value of the dates,—and so likewise in the present instance, as wine is, in effect, non-existent with respect to Mussulmans, they being prohibited, by the LAW, from using it in any shape.

Section.

The Shafee may either take the buildings or plantations of the purchaser (paying the value), or may cause them to be removed.—IF the purchaser of ground subject to a claim of Shaffa erect buildings or plant trees upon it, and the Kazee afterwards order the ground to be delivered to the Shafee, it in this case rests with him, [the Shafee] either to take the ground, together with the building or trees, paying the value of both, or to oblige the purchaser to remove them. This is the doctrine of the Zahir Rawayet.[1] It is recorded from Aboo Yoosaf that the Shafee cannot oblige the purchaser to remove his buildings; but he must either take the ground, paying the value of the trees or buildings, or relinquish the whole. This is also the opinion of Shafei. He, however, admits that the Shafee may cause the buildings or the trees to be removed, on indemnifying the purchaser in the loss he may thereby sustain. In short, according to him, the Shafee has three things in his option; for he may either take the

[1] The reference to this work does not appear in the Arabic text, but the statement is correct. (M.U.)

land, together with the trees and buildings, paying the value of those,—or he may cause them to be removed, indemnifying the purchaser,—or, lastly, he may relinquish the whole. In support of the opinion of Aboo Yóosaf two arguments are urged. FIRST, the purchaser was justifiable in erecting the building, since the ground was his own property, and it would therefore be unjust to oblige him to remove them;—in the same manner as where ground is for a short time transferred by a grant, or by a defective sale, and afterwards taken back,—in which case the granter or or the seller has it not in his power to oblige the grantee or the purchaser to remove any buildings he may have raised upon the ground whilst it was in his possession,—or (in cases of Shaffa) where the purchaser has raised a crop of grain from the ground,—in which case the Shafee cannot oblige him to remove it until it be fit for reaping.—SECONDLY, in the present case one of two grievances must follow; for either the Shafee must suffer a grievance in being obliged to pay an enhanced price for his Shaffa on account of the additional value of the buildings, or else the purchaser must suffer a grievance in being compelled to remove them. Now the latter of these grievances is the heaviest, for it is a loss without any recompense; whereas the increase of price paid by the Shafee is not without a consideration;—and where the Shafee either takes the ground, paying for the trees and buildings or relinquishes the whole, the greater of the two grievances is obviated, and the smaller one only is induced. The reasons urged in behalf of the opinion quoted from the Zahir Rawyet are, that as the purchaser has planted trees or erected buildings on ground over which the rights of another extend, without first obtaining the sanction of that other, they must be removed, in the same manner as where a person who holds ground in pledge builds upon it without the permission of the pledger.—Besides, the right of the Shafee is stronger

than that of the purchaser, as being of prior date; whence it is that any act of the purchaser, even such as the selling or granting of the ground, may be dissolved. It is otherwise with respect to a grantee, or a purchaser under an invalid contract (according to Haneefa); because they act under a permission from the possessor of the right; and also, because the right of resumption, in cases of gift or invalid purchase, is but of a weak nature,—whence it discontinues upon the erection of buildings. The right of Shaffa, on the contrary, still continues in force; and therefore the rendering absolutely obligatory the value of the trees or buildings, upon the Shafee, in case of his claiming his right, would be absurd; in the same manner as holds in cases of claim of right; [1]—in other words, if a person purchase land, and plant or build upon it, and it afterwards prove the right of another, the purchaser recovers the price of the land and the value of the trees and buildings from the seller, and not from the claimant of right; and in the present instance the Shafee stands as the claimant of right. Analogy[2] would suggest that grain also should be removed from the land; but, by a more favourable construction[3] of the LAW in this particular, it is not to be removed; because the term of its continuance is limited and ascertainable; and as the delay may be recompensed to the Shafee by a rent or hire, it cannot therefore be very grievous to him.

The Shafee is not entitled to any remuneration for buildings erected or trees planted on land which proves the property of another:—but he may remove them.—IF a Shafee, having obtained possession of his Shaffa land, erect buildings, or plant trees upon it, and it afterwards

---

1 Arab. Istihkak, meaning, a claim set up to the subject of a sale. (See *Hedaya* Vol. II. p. 294.)

2 The docrine of Qias (M.U.)

3 The doctrine, of Istehsan, juristic equity (M.U.)

appear that the land was wrongfully sold, being the property of another, the Shafee recovers the price,—from the seller, where he had taken the land from him,—or from the purchaser, where he had taken it from him ; because it is evident that it was wrongfully taken. He is not, however, entitled to recover from either party the value of his buildings or trees, but is at liberty to carry them wherever he pleases.—It is recorded from Aboo Yoosaf that the Shafee may also recover the value of the buildings or trees from the person from whom he received the ground ; because that person, under such circumstances, is considered as the seller, and the Shafee as the purchaser ; and it is an established rule that the purchaser may recover from the seller the value of such buildings as he has erected on the ground, if it appear that the ground sold to him was not the property of the seller, but of another person. There is, however, a difference, in this case, betwixt a Shafee and an ordinary purchaser ; for the latter is deceived by the seller, and is empowered by him to take the ground,—whereas the Shafee is not deceived by the purchaser, nor can he be said to be empowered by him to take the ground, since the purchaser himself is compelled, the Shafee taking possession of the ground without his consent.

If the property have sustained any accidental or natural injury after sale, still the Shafee cannot take it for less than the full price.—IF a man purchase a house or garden subject to a claim of Shaffa, and the building (owing to some unforeseen calamity) be destroyed, or the trees decay, it rests in the option of the Shafee either to resign the house or garden, or to take it and pay the full price ; because as buildings or trees are mere appendages of the ground (whence it is that they are included in the sale of land without any particular mention being made of them), no particular part of the price is set against

them.—unless where they have been wilfully destroyed by the purchaser, in which case it is lawful for him [the purchaser] to sell the appendages so destroyed, and make a profit by them, exclusive of the full price of the ground. It is otherwise when one half of the ground is inundated; for in such case the half of the thing itself being destroyed, the Shafee may take the remainder, paying only half the original price.

If the injury be committed by the purchaser, the Shafee may take the ground alone at its estimated value.—IF the purchaser wilfully break down the erections, the Shafee may either resign his claim, or may take the area of ground for a proportionable part of the original price; but he is not entitled to the ruins because they are become a separate property and are no longer appendages of the ground; and the right of Shaffa extends only to the ground, and to things so attached to it as to be appendages.[1]

Case of a Shafee taking ground with fruit trees.—IF a man purchase a piece of ground, having date trees upon it bearing fruit at the time, the Shafee is entitled to take the fruit,—provided particular mention have been made of it in the sale, for otherwise it is not comprehended. What is here advanced proceeds upon a favourable construction.[2] Analogy[3] would suggest that the Shafee is not entitled to take the fruit; because, as the fruit is a dependant both of the tree and of the ground) whence it is not included in a sale of ground unless it be particularly mentioned), it therefore resembles the furniture of a house. The reason for a more favourable construction, in this

---

[1] It appears from the Arabic text that one or two lines have not been translated but they repeat the view expressed in the previous paragraph. (M.U.)

[2] The doctrine of Istehsan (M.U.)

[3] The doctrine of Qias (M.U.)

particular, is that the fruit, in consequence of its connexion with the tree) is a dependant of the land, in the same manner as an erection, or any thing inserted in the wall of a house, such as a door, for instance; and therefore the Shafee is entitled to take it. The same rule also holds where the ground is purchased at a time when there is no fruit upon the trees, and the fruit is afterwards produced whilst it [the ground] is yet in the purchaser's possession;—in other words, the Shafee is here also entitled to take the fruit, because that is a dependant of the original article; in the same manner as in the case of a female slave who is sold,—if she be deliverd of a child previous to her being given over to the purchaser, still the child as well as its mother, is the property of the purchaser.

IN either of the two preceding cases if the purchaser have gathered the fruit, and the Shafee afterwards come and claim his privilege, he is not entitled to fruit so gathered; for it is no longer an appendage of the ground. It is said, in the Mabsoot,[1] that if the purchaser have gathered any of the fruit, a proportionable abatement should be made in the price to the Shafee. The compiler of the Hedaya remarks, that this is in the former only of the two above-mentioned cases; for the fruit being produced at the time, and being actually and expressly included in the sale it is natural to suppose that a part of the price was given in consideration of it; whereas, in the latter case, the fruit was not produced, and could only be included in the sale as a consequent, whence no part of the price could have been set aginst it.

---

1 The work Mabsoot is not mentioned in the Arabic text. (M.U.)

CHAPTER III

OF THE ARTICLE CONCERNING WHICH SHAFFA OPERATES.

The right of Shaffa holds with respect to all immoveable property.—THE privilege of Shaffa takes place with respect to immoveable property, notwithstanding it be incapable of division, such as a bath, a mill, or a private road. Shafei maintains that nothing is subject to Shaffa but what is capable of being divided; because (according to his tenets) the end of Shaffa is to obviate the inconveniences attending a division of property which does not hold in a property incapable of division. Our doctrine, however, is grounded on a precept of the prophet, who has said "SHAFFA takes place with regard to all lands or houses." Besides, according to our tenets the grand principle of Shaffa is the conjunction of property, and its object (as we have already explained) to prevent the vexation arising from a disagreeable neighbour; and this reason is of equal force whether the thing be divisible or otherwise.

THE privilege of Shaffa does not extend to household effects or shipping;[1] because of a saying of the prophet SHAFFA affects only houses and gardens;" and also, because the intention of Shaffa being to prevent the vexation arising from a bad neighbour, it is needless to extend it to property of a moveable nature.

Unless it be sold separate from the ground on which it stands.—IT is observed, in the abridgment of Kadooree,[2] that Shaffa does not affect even a house or trees when sold separately from the ground on which they stand. This opinion (which is also mentioned in the Mabsoot)[3] is approved;

1 The term, in the original, signifies boats, including every species of water-carriage.

2 The word " Kadooree " is not to be found in the Arabic text (M.U.)

3 The sentence within the bracket does not appear in the Arabic text (M.U.)

for as buildings and trees are not of a permanent nature, they are therefore of the class of moveables. There is, however, an exception to this in the case of the upper story of a house; for it is subject to Shaffa,—whence the proprietor of the understory is the Shafee, as is also the proprietor of the upper the Shafee of the under one, notwithstanding their entries be by different roads.

A Mussulman and a Zemmee are on an equality with respect to it.—A MUSSULMAN and a Zemmee, being equally affected by the principle on which Shaffa is established, and equally concerned in its operations, are therefore on an equal footing in all cases regarding the privilege of Shaffa; and for the same reason, a man or a woman, an infant or an adult, a just man or a reprobate, a freeman or a slave (being either a Mokatib[1] or a Mazoon[2]), are all equal with respect to Shaffa.

It holds with respect to property transferred in any shape for a consideration.—WHEN a man acquires a property in land for a consideration (in the manner, for instance, of a grant for a consideration), the privilege of Shaffa takes place with respect to it, because it is in the power of the Shafee to fulfil the stipulation.

It does not hold in a property assigned in dower, or as a compensation for Khoola, or as a hire, or in composition for murder, or as the price of manumission.—THE privilege of Shaffa cannot take place relative to a house assigned by a man as a dower to his wife, or by a woman to her husband as the condition on which he is to grant her a divorce, or which is settled on a person as his hire or reward, or made over in composition for wilful murder, or assigned over as the ransom

---

[1] A slave who could purchase his freedom from his master at the stipulated amount (M.U.)

[2] A slave permitted by his master to purchase and sell. (M.U.)

of a slave; for with us it is a rule that Shaffa shall not take place unless there exists an exchange property for property, which is not the case in any of these instances, as the matters to which the house is opposed are not property. Shafei holds Shaffa to take place in all these cases; because, although the matter to which the house is opposed be not property, it is neverthless capable of estimation (according to his tenets), and therefore the house may be taken upon paying the value of the matter to which it is opposed, in the same manner as in the sale of a property for a consideration in goods or effects. It is to be observed, however, that this opinion of Shafei obtains only with respect to a case where a part of a house is assigned as a dower, or made over as a consideration for Khoola, a composition for murder, and so forth; for according to his tenets, there is no Shaffa except in cases of joint property.[1]

It holds with respect to a house sold in order to pay the dower.—If a man marry a woman without settling on her any dower, and afterwards settle on her a house as a dower, the privilege of Shaffa does not take place, the house being here considered in the same light as if it had been settled on the woman at the time of the marriage.—It is otherwise where a man sells his house in order to discharge his wife's dower either proper or stipulated; because here exists an exchange of property for property.

If a man, on his marriage, settle a house upon his wife as her dower and stipulate that she shall pay him back from the price of the house, one thousand dirms according to Haneefa the privilege of Shaffa does not take place relative to that house; whereas the two disciples hold that

[1] That is for co-sharers only for according to the Shafi'-i-law the neighbour is not entitled to pre-emption.

it affects a part of the house equivalent to one thousand dirms.[1]

It does not hold with respect to a house the possession of which is compromised by a sum of money.[2]—The privilege of Shaffa does not operate relative to a house concerning which there has been dispute betwixt two men, compromised by the defendant (who was the possessor) paying the plaintiff a sum of money, after denying his claim; for in this case, the compromise being made after the denial, the house in the imagination of the defendant still belongs to him under his original right of property, and consequently no sale or exchange of property for property can here be established in regard to him;—and so likewise if he refuse to answer to the suit, and then compromise it with a sum of money,—since it may be supposed that he has parted with his money rather than be under the necessity of taking an oath, even with truth on his side, or of involving himself in litigious disputes and broils. If, on the contrary, he confess the justness of the plaintiff's claim, and then compromise with a sum of money, the privilege of Shaffa takes place; because as he has here acknowledged the plaintiff's right to the house, and retained it afterwards in virtue of a compromise, an exchange of property for property is clearly established in this instance.

---

1 The reasonings on both sides are here recited at large; but are omitted in the translation, as containing merely a string of metaphysical subtilities of little or no use.

Hamilton has not translated one or two lines as he says they are of little use, however a whole passage dealing with the right of co partners, has been omitted, *viz.* If the *Muzarib* partner (a partner who applies his personal labour) sells a house from the partnership property then the *rab-ul-mal* partner (a partner who supplies the capital in the partnership) is not entitled to pre-empt it. *Vide* sec. 30 (M.U.)

2 It appears from the Arabic text that two or three lines have been omitted which contain a reference to the *mukhtasar,* and rectify a mistake occurring in that book.

It holds respect to a house made over in composition.—IF a defendant compromise a suit by resigning or making over a house to the plaintiff, after having either denied his claim or acknowledged it, or refused to answer it, the right of Shaffa is established with respect to the house; because as the plaintiff here accepts the house in consideration of what he conceives to be his right, he is therefore [in adjudging the right of Shaffa against him] dealt with according to his own conceptions.

But not with respect to property transferred by grant.—THE privilege of Shaffa is not admitted in the case of grants, [1]—unless when the grant is made for a consideration, in which case it is, in effect, ultimately a sale.[2] Still, however, the privilege of Shaffa cannot be admitted, unless both parties have obtained possession of the property transferred to them by the terms of the grant (nor if the thing granted on either side be an indefinite part of anything); for a grant on condition of a return is still a grant in its beginning, as has been already explained in treating of gifts. It is further to be observed that the privilege of Shaffa cannot be admitted, unless the return be expressed as a condition on making the grant; for if it be not so expressed, and the parties give to each other reciprocal presents,[3] these presents on both sides are held as pure grants, although each of them having met with a requital of his generosity, neither is allowed the power of retreating.

It cannot take the place with respect to a property sold under a condition of option.—IF a man sell his house under a condition of option, [4] the privilege of Shaffa

[1] *Hiba* gift. (M.U.)

[2] Pre-emption is allowed in the case of gift on condition of a return *Hiba-ba-Shartel'iwaz* (M.U.)

[3] This is *Hiba-bil-iwaz.* (M.U.)

[4] That is, " reserving to himself the power of hereafter dissolving the sale." (See *Hedaya* Vol. II. pp. 220 to 256.)

cannot take place with respect to that house, the power reserved by the seller being an impediment to the extinction of his right of property: but when he relinquishes that power, the impediment ceases, and the privilege of Shaffa take place, provided the Shafee prefer his claim immediately. This is approved.

But it holds with repect to a property so purchased.—IF, on the contrary, a man purchase a house under a condition of option, the privilege of Shaffa takes place with respect to it; for such a power reserved by the purchaser is held, in the opinion of all the learned, to be no impediment to the extinction of the seller's right of property; and the right of Shaffa is founded and rests upon the extinction of the seller's right of property, as has been already explained.

And on the Shafee taking possession, the purchaser's right of option ceases.—IF the Shaffee take the house during the purchaser's right of option (namely, three days), such right ceases, and the sale is completely concluded; for the purchaser, as no longer having the house in his possession, is no longer capable of rejecting it; and the Shafee cannot pretend to claim the power of dissolving the bargain, since that power was founded in a condition established in favour of the purchaser only.

In a case of sale upon option, the possessor of the option is Shafee of the adjacent property.—IF, whilst one of the parties, either purchaser or seller, has the power of dissolving the bargain, the house adjoining to the one in question be sold, he who possessed such power is the Shafee of the adjoining house:—If it be the seller, he is the Shafee, because whilst he retained the power of dissolving the bargain, his right of property remained unextinguished;—or if it be the purchaser, his claiming the Shaffa of the second house is a proof of his inclination to keep the first, and not to avail himself of his power of

dissolving the bargain;—his right of property is therefore held to commence from the time of adjusting the bargain; and in consequence of his right of property in the first house, he has the right of Shaffa with respect to the second. If, in this case, the Shafee of the first house should afterwards come and claim his right, he is entitled to the Shaffa of the first house;—but he is not entitled to that of the second, becuse the first house was not his property at the time when the second was sold.

IF a man purchase a house without seeing it, and afterwards, in virtue of his privilege of Shaffa, take the adjacent house, which happens to be sold, still his power of rejecting the first house on seeing it does not cease; for as it would not be annulled even by an express renunciation, it consequently is not annulled by an act which affords only a presumption of renunciation.

The right does not hold with respect to a property transferred under an invalid sale.—THE privilege of Shaffa cannot take place regarding a house transferred by an invalid sale, either before or after the purchaser obtaining possession of it; for, before the purchaser obtains possession, the house belongs as usual to the seller, and his right of property is not extinguished; and after he has obtained possession there is still a probability that the bargain may be dissolved, since the LAW admits the dissolution of a sale, in a case of invalidity, in order to obviate such invalidity, an effect which could not be produced if the privilege of Shaffa were allowed. If, however, the purchaser put an end to the possibility of the dissolution by any particular act, such as by erecting buildings on the ground, or the like, the privilege of Shaffa may take place, since the impediment then no longer exists.

The seller of a property, under an invalid sale, is still Shafee of the adjacent property.—IF the house adjacent to one which has been transferred by an invalid sale be

sold whilst the one so transferred is still in the possession of the seller, he [the seller] is the Shafee of the adjacent house, because of the continuance of his right in the other.

Until he deliver the property sold to the purchaser, who then has the right.—If the seller have delivered over the first house, previous to the Kazee decreeing to him the Shaffa of the adjacent one, the purchaser, because of the property he has acquired in obtaining possession of the first house, is the Shafee of the second. It is otherwise where the seller delivers over the first house after the Kazee has decreed to him the Shaffa of the second; for in this case his right of Shaffa is not invalidated; because, after the decree of the Kazee has passed, it is no longer necessary that he preserve his right of property in that house from which he derived his right of Shaffa.

Which, whoever, fails upon the seller resuming his property.—If the seller take back the first house, previous to the Kazee decreeing the Shaffa to the purchaser, his [the purchaser's] right of Shaffa becomes null; because his right of property in that house from which he derived it has ceased previous to its being granted him by a decree of the Kazee. If, on the contrary, the seller do not take back the the first house until after the Kazee has decreed the Shaffa of the second to the purchaser, his [the purchaser's] right of Shaffa is not invalidated; because, at the time it was decreed, the house from which it was derived was his property; and (as we have already observed) after the decree of the Kazee has passed it is no longer necessary that he preserve his right of property in that house from which he derived his right of Shaffa.

A right of Shaffa is not created by partners making a partition of their joint property.—If two or more partners divide the ground in which they have hitherto held a joint property, the privilege of Shaffa cannot be claimed by any neighbour; because, although the division of joint

property bear the characteristic of an exchange, yet it also bears the characteristic of a separation, namely, a separation of the rights of one person from those of others, a thing which may be done by compulsion, since any one of the partners may cause it to be effected by an application to the Kazee, notwithstanding it be contrary to the inclination of the others. It is not therefore a pure exchange, which admits of no compulsion, but must be accomplished by the concurrenee of both parties; and the privilege of Shaffa is admitted by the LAW to operate only in cases of a pure exchange.

The right once relinquished cannot afterwards be resumed.—IF a man purchase a house, and the Shafee relinquish his privilege, and the purchaser afterwards reject it in virtue of an option of inspection, or a condition of option, or by a decree of the magistrate in virtue of an option from defect, the Shafee is not entitled to claim his privilege, whether the man had ever taken possession of the house or not; and so likewise, if the man, before taking possession, reject the house on discovering a blemish, without a decree of the Kazee; for as, under all those circumstances, the rejection is a dissolution of the bargain, the house reverts to its original proprietor; and the privilege of Shaffa is not established but on the notification of a new sale. If, on the contrary, the purchaser reject the house on discovering a blemish in it, after having taken possession without a decree of the Kazee,—or, if the seller and purchaser agree to dissolve the contract,—the privilege of Shaffa is established to the Shafee; because in those instances the rejection or dissolution is a breaking off with respect to the seller and purchaser, inasmuch as they are their own masters, and moreover will and intend a breaking off;—yet with respect to others it is not a breaking off, but is rather, in effect, a new sale, since the characteristic of sale, namely, an exchange of property for

property with the mutual consent of the parties, exists in it; and as the Shafee is another, it is therefore a sale with respect to him, whence his right of Shaffa must be admitted.[1]

CHAPTER IV

OF CIRCUMSTANCES WHICH INVALIDATE THE RIGHT OF SHAFFA

A right of Shaffa is invalidated by the Shafee omitting to procure evidence in due time.—IF the Shafee omit to procure evidence of his having claimed his Shaffa on being informed of the sale, notwithstanding his ability so to do, his right of Shaffa is void, because of his neglecting to claim it.—In the same manner also, if he prefer the Talb Mawasihat, or immediate claim, and omit the Talb Ish-had wa Takreer, notwithstanding his ability to make it, his right of Shaffa is void, as has been already explained.

Or by his offering to compound it.—IF the Shafee agree to compound his privilege of Shaffa for a compensation, he thereby invalidates his right, and is not entitled to the compensation; for he has no established right or property in the place in dispute, but merely a power of insisting on becoming the proprietor in exclusion of the purchaser; and as, therefore, a renunciation of Shaffa (understood in renouncing all right to disturb the proprietor in the enjoyment of the property) is not a subject of exchange, it follows that no consideration can be demanded for it. As, moreover, the relinquishment of the right could not lawfully be suspended even upon a valid condition, that is, a condition proper to it (such as a stipulation of giving up

---

[1] It appears from the Arabic text that here some lines have been omitted which refer to the Jamai-Saghir, and repeat the law stated above as regards partition among co-partners where there is no pre-emption, and its effect with reference to options as stated in the chapter on partition. (M.U.)

something in return which is not property), it follows that it cannot be lawfully suspended upon an invalid condition, or condition not proper to it (such as a condition, of giving up property in return for a mere right, which is not property), a fortiori. The condition of a return is therefore null, and the relinquishment of the right remains valid without a return;—and the case of a person selling his right of Shaffa is subject to the same rule.—It is otherwise in a case of composition for retaliation; because retaliation is a right established against the person of the murderer in behalf of the representative of the murdered, who is the avenger of his blood.—It is also otherwise with respect to a consideration received for manumission or divorce; because that is a consideration for a right of property established in the subject, of the manumission or divorce.—Analogous to the case of relinquishment of Shaffa for a compensation by composition is that where a man says to his wife, being under an option of divorce, "Choose me, for one thousand dirms," or where an impotent person tells his wife that "if she will relinquish her right of dissolving the marriage he will give her one thousand dirms; for if in either of these cases, the wife accept the proposal, she fofeits the power she possessed, and the husband cannot be compelled to pay the compensation.—Bail for the person, also (commonly termed Hazir Zaminee), bears a resemblance to Shaffa in this particular; for if a person who is bail for the appearance of a debtor apply to the creditor and prevail upon him to compromise with him, by relinquishing his claim on him as security, for a certain compensation, the surety is in this case released from his engagement, and at the same time is not liable for the compensation.—This is one tradition. According to another tradition, the surety can neither be made liable for the compensation, nor yet released from his engagement of bail. Some, also, contend that this last is the case

with respect to Shaffa, whilst others maintain that the rule applies to bail only.

Or by the death of the Shafee before the Kazee's decree.—If the Shafee die, his right of Shaffa becomes extinct.[1] Shafei maintains that the right of Shaffa is hereditary.—The compiler of the Hedaya remarks that this difference of opinion obtains only where the Shafee dies after the sale, but previous to the Kazee decreeing him the Shaffa; for if he die after the Kazee has decreed his Shaffa, without having paid the price, or obtained possession of the property sold, his right devolves to his heirs, who become liable for the price.[2] The argument of our doctors upon the point in which they differ from Shafei is, that the death of the Shafee extinguished his right in the property from which he derived his privilege of Shaffa; and the property did not devolve to his heirs until after the sale. Besides, it is an express condition of Shaffa, that a man be firmly possessed of the property from which he derives his right of Shaffa at the time when the subject of it is sold, a condition which does not hold on the part of the heirs. It is, moreover, a condition that the property of the Shafee remain firm until the decree of the Kazee be passed; and as this does not hold on the part of the deceased Shafee, the Shaffa is therefore not established with respect to any one of his descendants, because of the failure of its conditions.

It is not invalidated by the death of the purchaser, and therefore cannot be disposed of on his behalf. If the purchaser die, yet the right of Shaffa is not extinguished, for the Shafee who is entitled to it still exists, and no

---

1 This is the view of the Hanafi jurists.

2 It appears from the Arabic text that a line has been omitted. "And similarly according to the Hanafi jurists but not the Shafi'i the right of option drops on the death of the person entitled as stated in the chapter on sale." (M.U.)

alteration has taken place in the reasons or grounds of his right. The house, therefore, is not to be sold for the payment of the purchaser's debts, or disposed of according to his testament; and if the Kazee or executor sell it in order to discharge the debts of the estate, or if the purchaser have bequeathed it, the Shafee may render any of these transactions void, and may take the house; for the right of the Shafee is antecedent,—whence he has the power of annulling the purchaser's acts with respect to the property, even during his lifetime.

It is invalidated by the Shafee selling the property whence he derived his right.—If the Shafee, previous to the decree of the Kazee, sell the house from which he derives his right of Shaffa, the reasons or grounds of his right being thereby extinguished, the right itself is invalidated, notwithstanding he be ignorant of the sale of the house to which it related;—in the same manner as where a man relinquishes his Shaffa without being informed of the sale,[1] or acquits a person of a debt without knowing the amount; in the first of which cases the right of Shaffa is invalidated, and in the second the debtor is acquitted. It is otherwise where the Shafee sells his house upon a condition of option; for as, whilst a power of option remains in the seller, his property is not totally extinguished, it follows that the ground of Shaffa (namely, a conjunction of property) still continues.

Or by his acting as agent for the seller.—If the Shafee act as agent of the seller, and sell the house on his behalf, his right of Shaffa is thereby invalidated;—whereas if he act as agent for the purchaser, and purchase the house on his behalf, his right of Shaffa is not invalidated.

---

1 In my opinion according to the Arabic text the phrase "without being informed of the sale" is an incorrect translation; the Arabic word is *sarihan* which means deliberately, or intentionally." (M.U.)

In short, it is a rule, that if a person, as agent for another, sell the land, &c., of that other, the right of Shaffa in both is thereby invalidated; whereas, if an agent (such as a manager, for instance) purchase land, or so forth, the right of both continues unaffected; for the former, if he were afterwards to contest his right, must in so doing labour to annul the sale which was completed by him,—whereas the latter, in so doing, does not annual the purchase made by him, the taking of a property in virtue of Shaffa being itself a sort of purchase. In the same manner also, if the Shafee become Zamin be'l Dirk, or bail for what may happen,[1] by engaging to be responsible to the purchaser for the amount of the price in case the house should afterwards prove the right of another person, his right of Shaffa is thereby invalidated. So also, if a man sell a house, stipulating the option of a third person, meaning the Shafee and he [the Shafee] confirm the sale, he thereby forfeits his right of Shaffa; whereas, if a man purchase a house, stipulating the option of a third person, who is the Shafee, and he [the Shafee] confirm the purchase, his right of Shaffa is not invalidated.

He may resume his right where he had relinquished it upon misinformation concerning the price.—IF intelligence be brought to the Shafee, of the house which is the subject of his right being sold for one thousand dirms, and he relinquish his right of Shaffa, and afterwards learn that the house was sold for a less price, his resignation is not binding, and he may still assert his right of Shaffa, for it was the dearness of the price which induced him to resign; but upon the diminution of the price becoming known, the reason of his resignation no longer exists, and it is consequently void. In the same manner also, if news be brought that the house is sold for

1 For an explanation of this phrase See *Hedaya* Vol. II. p. 255.

one thousand dirms, and the Shafee afterwards learn that it was sold for a quantity of wheat or barley equivalent to one thousand dirms, or even more, his resignation is void, and he may still take his Shaffa ; because it is to be supposed that his reason for resigning it was his inability to furnish the amount of the price in that species (namely, dirms) for which he first heard the house was sold ; but upon his understanding that it was sold for wheat or barley, it is probable that he may be able to furnish the quantity, since it frequently happens that men who are unable to pay one thousand dirms are capable of furnishing an equivalent, or even more than an equivalent, in barley or wheat. This rule also holds regarding every other article sold by weight or measure, or which differs so little in its species[1] that it may be sold by number (such as eggs or walnuts), in the same manner as with respect to barley or wheat. It is otherwise with respect to goods or effects ; for if the Shafee, hearing that the house is sold for one thousand dirms, resign his right, and afterwards learn that it was sold for goods equal in value to one thousand dirms or more, his resignation is nevertheless binding, and he is not entitled to his Shaffa, because he would in this case be liable for the price of the goods which consists of dirms and deenars.—So, likewise, his resignation is binding if he afterwards learn that the house was sold for a certain number of deenars equivalent to one thousand dirms, or more.[2]

Or the purchaser.—IF the Shafee be first informed that a particular person is the purchaser, and thereupon resign his Shaffa, and he afterwards learn that the purchaser was another person, he is still entitled to his Shaffa,

---

[1] The words within the bracket are not found in the Arabic text ; the example however is correct (M. U.)

[2] It appears from the Arabic text that one or two lines are omitted here| *viz.*, for both are coins but according to Zafar there is a right of pre-emption (M. U.)

because a man might not wish to have one person for his neighbour, although he may very readily choose to have another. In the same manner also, if he afterwards learn that two persons are the purchasers (viz, the one whose name he first heard of, and another), he is entitled to take his Shaffa from the one in whose favour he had not resigned it.

Or where he has been misinformed concerning the article sold.—IF news be brought to the Shafee that one half of the house is sold, and he resign his right, and it afterwards appear that the whole was sold, he must still in such case claims his Shaffa, since it is to be supposed that he at first resigned his right in order to avoid the inconvenience of a partner, whereas if the whole be sold there is no occasion for his being subject to any such inconvenience. If, on the contrary, the case be reversed, that is to say, if he first learn that the whole, and afterwards that only the half is sold, he is not (according to the Zahir Rawayet) entitled to claim his Shaffa, because his resignation of the whole comprehended his resignation of a part.

Section.[1]

Device by which the right of Shaffa may be evaded.—WHERE a man sells the whole of his house, excepting only the breadth of one yard extending along the house of the house of the Shafee, he [the Shafee] is not in this case entitled to claim his privilege, because of his neighbourhood being thus cut off. This is a device by which the Shafee may be disappointed of his right; and it is still the same, if the seller grant the intervening part of his house as a free gift to the purchaser, and put him in possession of it.

1 A number of devices have been suggested by the jurists. Some of them are rather ambiguous. The Hedaya has mentioned **three only. (M. U.)**

Case of a house purchased in shares, by the same person, at different times.—IF a man purchase, first, a share of a house, such as a third or a fourth, and afterwards the remainder,—the neighbour has the privilege of Shaffa over that share which was first bought, but not over that which was last bought; for although, as being a neighbour, he is entitled to that privilege over both, still the purchaser has a superior right to the Shaffa of the remainder of the house, as being a partner therein, the right of a partner superseding that of a neighbour, as has been already explained. If, therefore, a man wish to disappoint a neighbour of his right of Shaffa, he may do it by first purchasing a part of the house, for the price he means to give for the whole, excepting only a single dirm, which he may afterwards give as the price of the remainder.

Where the price of the property sold is compromised for a specific article, the Shafee, *if he insist on his right, must pay the price.*—IF a man purchase a house for a certain price, and afterwards, in lieu of that price, give a Jamma, or gown, to the seller, the Shafee must take the house for the price first settled, and not for the value of the gown for the exchanging of the price for the gown was a distinct and separate bargain; and the price which the Shafee is to pay is on account of the house, not on account of the gown. The compiler of the Hedaya remarks that this also is a device, by which the right of Shaffa, either in a partner or a neighbour, may be eluded as the house may be sold for a price equal to twice its value, and then, in lieu of that price, a gown may be given to the seller equal to the real value of the house. Such an evasion, however, may be productive of loss to the seller in case the house should afterwards prove to have been the right of another; for then the purchaser of the house is entitled to receive back, from the purchaser of the gown (that is the seller of the house),

the whole price of the house, which was much more than adequate to its value, the bargain regarding the gown remaining undissolved. There is, indeed, one mode by which the seller may avoid the risk of such a loss ; and that is, by purchasing, in lieu of the number of dirms for which the house was sold, a quantity of deenars ;—for, as this is a Sirf sale, it follows that, upon the right of another appearing to the house, the agreement becomes null, at mutual seizin, which is a condition of Sirf sale, does not here exist ; because as it here appears that the seller was not entitled to the price of the house in lieu of what he purchased or accepted deenars, he is obliged to restore the deenars, but nothing more.

A DEVICE, as above described, for eluding the privilege of Shaffa, is not abominated by Aboo Yoosaf. According to Mohammed, however, it is abominable ; because (as he argues) the privilege of Shaffa is instituted solely with a view to prevent the inconvenience which might otherwise ensue to the Shafee ; but if devices are admitted to elude and set at nought his privilege, the inconvenience which may ensue will not be prevented, and the end of the institution will be defeated. The argument of Aboo Yoosaf is, that as the above devices prevent the right of Shaffa from ever being established, the inconveniences that may accrue to the Shafee ought not to be considered.

Section.

MISCELLANEOUS CASES.

The Shafee may take a share from one of several purchasers ; but if there be several sellers, and only one purchaser, he must take or relinquish the whole.—IF five persons purchase a house from one man, the Shafee may take the proportion of any one of them. If, on the contrary, one man purchase a house from five persons, the Shafee may either take or relinquish the whole, but is not

entitled to take any particular share or proportion. The difference between these two cases is that if, in the latter instance, the Shafee were allowed to claim a part, it would occasion a discrimination in the bargain to the purchaser, and be productive of very great inconvenience to him; whereas, in the former instance, the Shafee being merely the substitute of one of the five purchasers no discrimination in the bargain is occasioned. There is no difference in the law in either of these cases, whether in making the purchase, a certain proportion of the price had been set against each proportion of the house, or whether one price had been in general terms agreed upon for the whole; for the law is grounded only upon the discrimination in the bargain. Neither is there any difference whether the Shafee take his right before the purchaser has obtained possession, or delay it until after.—This is approved. It must, however, be observed, that if one of the purchasers have not obtained possession, although he have paid his proportion of the price, the Shafee is not entitled to take his share of the house until the rest of the purchasers have also paid their respective proportions of the price; for otherwise, a part of the house being in the possession of the Shafee, and a part still remaining it that of the seller, it is to be apprehended that the seller might suffer vexation from having a bad neighbour. In short, the Shafee here stands in the room of one of the purchasers; and one of the purchasers, on paying his proportion of the price, may not take possession of his share until the rest [of the purchasers] have also paid their proportion. It is otherwise after possession; for in that case the Shafee may assert his privilege, as the possession of the seller is then destroyed.

In case of the sale and partition of half a house, the Shafee may take the purchaser's lot.—IF a man purchase one half of a house, and afterwards the seller and

purchaser make the partition betwixt themselves, the Shafee may either take or relinquish that half which fell to the lot of the purchaser, on whichever side it happens to be situated; but he cannot object to the partition, and insist upon a new one; for a Shafee is not entitled to disturb the possession of the seller; and as partition is an act of investiture, he is therefore not entitled to disturb the partition also. This related as the opinion of Aboo Yoosaf. It is recorded from Haneefa, that the Shafee is not authorized to take the half in question, unless it happen to be on that side next to the house from which he derives his right; for if the purchaser's lot fall in the other part of the house, he [the Shafee] is not the neighbour.

If one partner sell his share, the Shafee may annul any subsequent partition, and take it for the price.—IF one of two partners in a house sell his share, and afterwards the purchaser and the remaining partner make the partition together, the Shafee may object to such partition, and insist upon a new one; because, as no sale took place betwixt the purchaser and the remaining partner this partition is not, strictly speaking, an act of investiture, but merely an exercise of right of property, and consequently, the Shafee is entitled to annul it, in the same manner as he may annul any other act of property, done by the purchaser, such as sale, or gift.

A licensed slave (involved in debt) and his master may be Shafee to each other's property.—IF a man, being possessed of a Mazoon[1] [licensed] slave, involved in debt, sell his house, that slave may be the Shafee of it. And in the same manner also, if such a slave sell a house, his master may be the Shafee of it; for the act of taking a property by privilege of Shaffa stands as a purchase; and purchase and sale is admitted betwixt them, as being

[1] A slave is permitted by his master to purchase and sell. (M. U.)

attended with advantage, since it is here considered to be on behalf of the creditors. It is otherwise where the slave is not involved in debt; for then, if he sell a house, it is on account of his master; and the man on whose account the house is sold cannot be the Shafee.

Acts of a father or guardian with respect to the Shaffa of an infant ward.—IF a father or guardian resign the right of Shaffa belonging to their infant ward, such resignation is lawful, according to Aboo Yoosaf and Haneefa [1]. Mohammed and Ziffer say that it is not lawful; and that the right of the infant Shafee being still extant, he is entitled to claim it as soon as he attains maturity. The learned in the law observe that there is the same difference of opinion in the case of a father or guardian omitting to make the claim of Shaffa on being apprised of the sale of the house;—or of an agent resigning the claim before the tribunal of the Kazee. The arguments used by Mohammed and Ziffer are twofold.—FIRST, it is alleged that the right of Shaffa being firmly established in the infant, the father or guardian have not the power of annulling it, any more than of annulling his right to a fine of blood or retaliation.—SECONDLY, their authority over the affairs of the infant is vested in them in order that they may prevent him from suffering any injury; and if they were to annul his right of Shaffa, they would occasion an injury instead of preventing one. The arguments, on the other hand, in support of the doctrine of Aboo Yoosaf and Haneefa are likewise twofold. FIRST, the taking by privilege of Shaffa is virtually traffic, since it stands as purchase; and the father or guardian may therefore reject it, in the same manner as a thing offered for sale.—SECONDLY, the taking by privilege of Shaffa is an act of a doubtful tendency, as it may

[1] Imam Abu Hanifa's view seems to be in agreement with the law in British India. (M. U.)

either be productive of loss or of gain: the relinquishing of it may therefore be sometimes the most for the minor's benefit, inasmuch as the price of the house will still remain his property; and as the power of a father or guardian is granted them with a view to the benefit, of the infant, they ought consequently to have the power of rejection.

THE silence of the father or guardian, or their omitting to claim the Shaffa, being considered as a rejection, annuls the right. It is to be observed that the difference of opinion above mentioned obtains only in cases where the house in the neighbourhood of the infant is sold for a price nearly adequate to its value: but that where the house is sold for more than its value, beyond what appraisers would rate it at, and which it would be most advisable to avoid, some say that the resignation of the father and guardian is admitted to be lawful by all authorities, as being purely advantageous; whilst others, on the contrary maintain that, according to all, it is not lawful; for as the father and guardian are not empowered, in such a case, to take the Shaffa, so also they are not empowered to reject it, but are as strangers; and the right of the infant still continues to exist.

IF a house in the neighbourhood of an infant be sold for a price much inferior to its value, it is recorded as an opinion of Haneefa that in such case the resignation of a father or guardian is invalid [1].

[1] It appears from the Arabic text that a line has been omitted *viz.*, "Abu Yusuf has declared no opinion on this point." (M. U.)

TABLE OF CASES*

*Abbreviations—

Agra—Agra High Court Reports
All.—Indian Law Reports Allahabad Series
A. L. J. R.—Allahabad Law Journal Reports.
A. W. N.—Allahabad Weekly Notes
Bom.—Indian Law Reports Bombay Series
B. L. R.—Bengal Law Reports
B. H. C. A. C.—Bengal High Court Reports
Cal.—Indian Law Reports Cal. Series
C. L. R.—Calcutta Law Reports
I. C.—Indian Cases Reports
In. A.—Law Reports Indian Appeals
Moo. Ind. Ap.—Moore's Indian Appeals
N. W.—North West Provinces High Court Reports
O. C.—Oudh Cases Reports
Pat. L. J. —Patna Law Journal
P. R.—The Punjab Records
S. D. A.—Sudder Dewanny Adawlat
W. R.—Weekly Reporter
F. B.—Full Bench
P. C.—Privy Council.

BIBLIOGRAPHY

Abbasi, A. I. The Law of Pre-emption
Agarwala M. L. The Law of Pre-emption
Acts vide Index
Ameer Ali Mahommedan Law, Vol. I
Andre Marneurs, La Chefa
Baillie N.; Digest of Moohammadan Law
Codice Civille Italian
Code Civil Ottoman
Cambridge Mediæval History Vol. II
Dayal B. the Durrul Mukhtar
The Egyptian Act 1900
Federal Public Land Laws
The French Civil Code
Civil Code of Spain
Justinian Digest and Institutes
Kathalay D.W. The Law of Pre-emption
Hamilton C; the Hedaya
Laveleye, Premitive Society
Les Code Civilis E 'Tranger's'
The Majma-ul-Bahrain
Milman History of the Jews
Manu Kyay Book VII
Manual of Naval Prize Law
Querry A Droit Musalman
Simcox Primitive Civilisation
Sircar S. Tagore Law Lectures 1873
The Sharaya-al Islam
Tyabji F.B. Principles of Muhammadan Law
West and Buhler Digest of Hindu Law
Wilson R. Digest of Anglo-Muhammadan Law

Authorities on the Muslim Law referred to in the Fatawa-i-Alamgiri.

The Adab-ul-kazi
The Ajnas
The Asl
The Badayi
The Fatawa-i-Abu Lays
The Fatawa-i-Fazli
The Fatawa-i-Itabiyya
The Fatawa-i-Kazi Khan
The Fatawa-i-Kifayah
The Fatawa-i-Kubra
The Havi
The Haruni
The Hedaya
The Hilal-al-Basri
The Jami-al-Fatawa
The Jami-al-Kabir
The Jami-Saghir
The Jawahara Nirah
The Kafi
The Khulasa
The Khizanatul-muftin
The Mabsut
The Mukhtar
The Muhit
The Muhit of Sarakhsi
The Mujarrad
The Multaqat
The Muntaqa
The Muzamarat
The Nawadir
The Nihaya
The Quynah
The Sharah-al-Tahavi
The Sharah Kitab-ul-Shufa
The Shafat-ul-Jami
The Siraj-ul-Wahhaj
The Sirajiyya
The Tabyin
The Tafrid
The Tajrid
The Tatar Khaniyya
The Wajiz of Kadri
The Yatimat
The Zahiriva
The Zahir Riwayat
The Zakhira



GENERAL INDEX

The references throughout are to pages

D

E

G

H

I

K

L

M

N

O

P

R

S

T

U

V

W

Other Juristic Works on the Muslim Law and Jurisprudence

BY

AL-HAJ DR. MAHOMED ULLAH *ibn* S. JUNG, M.A., LL.D.

1. "The Muslim Law of Marriage."

(Complied from the Original Arabic Authorities preceded by a comparative and descriptive introduction)... Rs. 5.

2. "The Administration of Justice of Muslim Law." (Preceded by an introduction to the Muslim Conception of the State) ... ... Rs. 5.
This book has been mentioned by the University of Allahabad for B. A. Politics (Honours) course.

3. The Principles of Muslim Law.

(A useful codified Digest indispensable for Practitioners) ... ... Rs. 5.

4. A Dissertation on the Origin and Development of The Muslim Law of Marriage ... ... As. 12.

5. A Dissertation on the Muslim Law of Legitimacy and Section 112 of the Indian Evidence Act ... As. 12.

---

6. The Life and Times of Khajeh Hafiz of Shiraz
Second Edition (1928) ... ... Re. 1.
(This was an eassy presented by Nawab Sarbuland Jung Bahadur to the Statutory Ninth International Congress of Orientalists 1891).

7. The Muhammadan Matrimonial Law.

(A judgment—Musammat Rasulan *versus* Mirza Naim-ul-lah) by Maulvi Haji M. Samee-ul-lah Khan Bahadur C. M. G., late District and Sessions Judge, Rae-Bareli, Oudh.
Second Edition (1931)... ... Re. 1-4-0.

(This case has been noted with approval by Ameer Ali's Muhammadan Law, Vol. II. It criticises Abdul Kadir *versus* Salima, 8 All., 149. F. B.)